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SPORT-SPECIFIC ARBITRATION IN CANADA: A QUALITATIVE
INVESTIGATION OF FOUR ATHLETES' PERCEPTIONS OF THE FAIRNESS OF
THE PROCESS

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Dedication

This thesis is dedicated to my parents, Charles and Elizabeth Gardner. Without their unconditional support, this work would not have been possible. I would also like to dedicate this work to my grandfather, Donald Gardner. He is the patriarch of my family, and his influence on me has been profound. I have always viewed him as hard working, disciplined, and generous, which are all qualities I hold in the highest esteem. His example, really helped make this work possible.

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Abstract

This thesis explored Canadian high performance Athletes perceptions of the fairness of the SDRCC sport-specific arbitral process. Leventhal's (1980) model of procedural justice judgment was found to be an effective tool for exploring Athletes' perceptions of the fairness of the process. Five of his six procedural justice antecedents: consistency, bias suppression, accuracy of information, representativeness, and ethicality influenced the Athletes' perceptions of the fairness of the process. Emergent data also revealed that the Athletes' perceptions of fairness were also influenced by three contextual factors and an additional antecedent of procedural justice. Efficiency of the process, inherent power imbalance between Athletes and NSOs, and the measurable effect of the process on personal and professional relationships differentiate sport-specific arbitration from most other processes of allocation. The data also indicated that the opportunity to voice one's case was also an important determinant of the Athletes' perceptions of the fairness of the process.

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I would like to acknowledge the special efforts of my Academic Supervisor, Hilary A. Findlay. Her tireless work ethic, commitment to excellence, and relentless attention to detail contributed to both the substance and quality of this work and cannot be overstated. I am most appreciative of her commitment to my development as a graduate student and this work. She is a great mentor and, I am certain, will continue to be an important influence in my professional life.

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CHAPTER I

Introduction

Arbitration is an increasingly common form of dispute resolution in sport (Anderson, 2006; Beloff et al., 1999; Blackshaw, 2002; Findlay, 2006; Findlay & Corbett, 2002; Hayes, 2004).¹ Sport-specific arbitration systems are well established in the United States, China, United Kingdom, Australia, New Zealand, Japan, and Canada, among other countries. The Sport Dispute Resolution Centre of Canada (SDRCC) houses and manages a national, mandatory sport-specific arbitration process in Canada. Recourse to the SDRCC arbitration process is available to anyone engaged in a dispute with a national sport organization (NSO) in Canada.

The SDRCC process was initially established to ensure fairness in the decision-making of NSOs. While the SDRCC reviews such decisions for fairness, it too must ensure its own process is fair. As a private tribunal, the SDRCC has discretionary power to review the decisions of NSOs but only insofar as it too adheres to fundamental principles of fairness (McCutcheon, 2000). The concept of ‘fairness’ has a definite legal meaning, which is embedded in the procedures of the arbitral process. The operation of legally fair procedures can be referred to as ‘objective fairness’. In Canada, objective fairness, or legal fairness, is referred to as “procedural fairness” (Jones & De Villars,

¹ For the purposes of this study, sport is a reference to international high performance sport and not professional sport.

1985)² and is considered the legal foundation for decision-making in sport (Foster, 2006). Fairness may also be defined in ‘subjective’ terms. This subjective reference speaks to a different kind of fairness and is referred to by social psychologists as ‘perceived fairness’ or ‘perceived justice’. Justice, as a social phenomenon, accounts for how fair, or just, people perceive an ordinary social experience, or process, to be (Sanders & Hamilton, 2000). In an arbitral process, for example, perceptions of fairness can be affected by the outcome of the dispute resolution process (i.e., distributive justice), by the procedures of the dispute resolution process (i.e., procedural justice), or by the interaction between the arbitrator and the disputing parties (i.e., relational justice). This thesis is specifically concerned with procedural justice and the extent to which an individual *perceives* a legal or quasi-legal process to have dealt with him or her fairly. This assessment is not one based solely on objective legal criteria but, as well, on psychological criteria, or antecedents. The fairness of the arbitral process is thus composed of both those procedures that exist to meet minimum legal standards of fairness and those that lead to the participant also feeling, or perceiving, the process was fair, regardless of its legality.

The thesis will explore the perceptions of fairness of Canadian high performance Athletes who have been part of a dispute hearing process (i.e., arbitration) heard using the SDRCC arbitral process. Leventhal’s (1980) six antecedents of procedural justice will be used as a basis for examining Athletes’ perceptions of the fairness of the process.

² Objective fairness, or legal fairness, is variably referred to in the legal literature as procedural fairness, due process, natural justice, and fundamental justice. In the interest of consistency, the term ‘procedural fairness’ will be used throughout this thesis in reference to the objective legal criteria that govern the decision-making processes.

Context of the Study

Sport by nature is a rule-based activity. To produce internationally protected competition, sport governing bodies impose strict sanctioning rules relating to, among other matters, eligibility, selection, doping, and discipline (Mitten & Davis, 2008). Institutionalized sport-specific systems of arbitration have proven effective and efficient alternatives to court-based litigation for adjudicating issues relating to the transgression of such rules (McCutcheon, 2000). As governing bodies for sport in Canada, NSOs have the authority to write, interpret, and enforce the rules of their sport (Corbett, Findlay, & Lech, 2008). When a breach of such rules occurs by, for example, a member athlete, NSOs will hear the dispute through its internal dispute resolution process. As such, and in the truest sense of the term 'governing body', NSOs are quite literally the rule makers, prosecutors, and judges of matters relating to sport (Mew & Richards, 2005). Historically, in Canada, there has been a perception that athletes were being unfairly treated by NSOs in this 'governing' capacity (Canadian Heritage, 2000; Kidd & Eberts, 1982). Concerns that athletes were being denied rights to natural justice, coupled with the fact that domestic courts have not lent themselves well to the resolution of sport-related disputes, led to the eventual institutionalization of sport-specific arbitration in Canada at the national level.

What is arbitration?

Arbitration is a private method of alternative dispute resolution (ADR) founded on principles of contract. It represents a terminal point on the dispute resolution continuum, as a decision delivered by an arbitrator is final and binding on the disputing parties. The trend to arbitrate sport-related disputes has developed relatively quickly and

is the dominant method of dispute resolution at the national and international levels of sport.

What is sport-specific arbitration in Canada?

In Canada, a formal sport-specific arbitration process has existed since 2002 and is housed and managed by the SDRCC (SDRCC, History, n.d., ¶ 5). Athletes participating with Canadian NSOs are able to access the SDRCC sport-specific arbitral process if they are dissatisfied with the process or outcome of an internal, NSO administrative review hearing. Decisions delivered by SDRCC arbitrators are final and binding on all parties and cannot be appealed to another judicial body except for judicial review (Article 6.6, Canadian Sport Dispute Resolution Code “*Code*”). The institutionalization of a mandatory, sport-specific arbitral program in Canada was pursued in the interest of protecting athletes’ right to procedural fairness in decision-making; nonetheless, it can be an onerous method of dispute resolution in the sense that it precludes athletes from pursuing other remedies available through the courts.

What is procedural justice?

Theories and models of procedural justice have been used extensively since the mid 1970's to measure the extent to which people perceive a dispute resolution process to have been fair. Such perceived, or subjective, fairness can be seen in contrast to legal fairness, which is defined by an objective legal standard. Perceived fairness can be attributed to how people view the outcome of a dispute resolution process (i.e. distributive justice), how they view the process itself (i.e., procedural justice), and how they feel they were treated throughout the process (i.e. relational justice) (Howieson, 2002). Antecedents of procedural justice are the psychological criteria used to explain the

likelihood that a dispute resolution process will be perceived as fair by its users (Leventhal, 1980).

Justification of the Study

There is a dearth of literature addressing the phenomenon of perceived fairness in sport-specific arbitration. Clearly, arbitral decisions, including sport-specific arbitral decisions, must be legally fair - they must meet the legal standard of procedural fairness. If they do not, they are open to judicial review by a court of competent jurisdiction. However, little attention has been paid to how athletes view the arbitral process. In many respects, the subjective perspective of fairness is as important as ensuring the legal fairness of the process. Some might suggest that an unsuccessful party will naturally feel the process has not been fair; however, the literature suggests peoples' perceptions of fairness are much more complex and nuanced than this (Lind & Tyler, 1988; Thibaut & Walker, 1975; Leventhal, 1980). In an effort to help fill the gap, Leventhal's (1980) model of procedural justice judgment will be used in an analysis of past SDRCC arbitral decisions of disputes between Canadian high performance Athletes and their respective NSOs. Since athletes are likely to continue a formal relationship with their NSO once the arbitration process is complete, there is a need to reconcile sport-related disputes in a manner that positively influences their perceptions of fairness. In its current operations, the SDRCC claims:

The most important **disadvantage** of arbitration is that the decision will be in favour of a party and leave the other party deeply unsatisfied. As a result, the arbitration process may not lead to parties preserving their relationships. Quite evidently, it is not an ideal situation when disputes arise within a group of people

that will undoubtedly have to work together again, as is the case in most sports-related disputes. (SDRCC, Arbitration, n.d., ¶ 3, original emphasis)

The disadvantage cited above rests on athletes' distributive concerns of justice (i.e., outcome) and ignores the influence of arbitral procedures on perceived satisfaction, or in this case, perceived fairness. The insight gleaned from the arbitration experiences of Canadian high performance Athletes will reveal the extent to which (if at all) the SDRCC arbitration procedures influence the sample Athletes' perception of the fairness of the process.

Purpose of the Study

The purpose of the study is to investigate the perceptions of fairness of Canadian high performance Athletes who have had disputes heard through the sport-specific arbitral process of the SDRCC. An exploratory case study, grounded in socio-legal theory, will be used to develop an understanding of how fair Athletes perceive the process of mandatory, sport-specific arbitration to be in Canada. The research questions driving the study are:

1. What are Athletes' perceptions of the fairness of the SDRCC arbitral process?
2. How do Athletes' perceptions of fairness reconcile with Leventhal's (1980) theory of procedural justice?
3. What do Athletes' experiences in arbitration reveal about procedural fairness?

Limitations of the Study

The following list of limitations will be factors in conducting the study:

- 1) This study is limited by the number of SDRCC arbitrations. From 2002-2010, approximately 122 cases have been heard.

- 2) Due to the confidentiality of SDRCC arbitration proceedings, the Athletes' arbitral experiences cannot be observed directly by the Principal Investigator.

Delimitations of the Study

The following delimitations will be used to narrow the focus of the study:

- 1) This study has been delimited to the Canadian national sport context. The results of the study may not be generalized to other models of sport-specific arbitration, which are designed and operated differently.
- 2) Only the Athletes' subjective experience with arbitration will be used for this research. This requires direct access to athletes who have submitted a dispute to be heard by the SDRCC. NSO views (i.e., those of the responding party) will not be considered.
- 3) The SDRCC has two distinct sets of arbitration procedures. One set is used exclusively for doping disputes (i.e., the Doping Division), while the other set is used in the Ordinary Division, which hears predominantly selection, carding, discipline, and eligibility disputes. This study will examine only the Ordinary Division rules of arbitration.

Chapter 2

Review of Literature

Arbitration

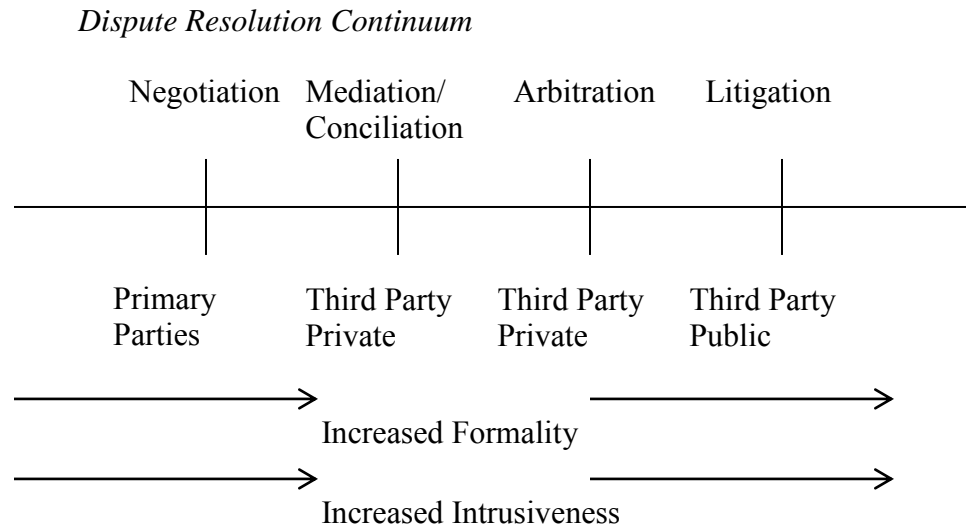
Arbitration is the dominant form of dispute resolution used in sport today (Anderson, 2006; Beloff et al., 1999; Blackshaw, 2002; Findlay, 2006; Findlay & Corbett, 2002; Hayes, 2004). This section of the literature review will introduce the process of arbitration and inventory the advantages and disadvantages of sport-specific arbitration.

Arbitration: the general concept.

Arbitration is one of the main dispute resolution processes existing within the rubric of alternative dispute resolution (ADR). ADR refers to alternate ways of resolving disputes other than through litigation. This includes negotiation, mediation/conciliation, and arbitration, among others. Figure 2.1 sets out some of the basic processes included under the umbrella of ADR. As can be seen, dispute resolution exists along a dual continuum of flexibility and control. As the degree of third-party intervention increases, parties increasingly surrender control over the dispute resolution process. As parties' lose control over the dispute resolution process, so too they lose flexibility. Effron (1989) refers to this dual continuum in terms of "formality" and "intrusiveness" (p. 482). Formality refers to the extent to which a dispute resolution process is structured and standardized. Intrusiveness is a reference to the degree of control a third-party decision-maker has over the outcome of the resolution process (Effron, 1989). Arbitration sits on this dual continuum between mediation/conciliation and litigation. As a method of dispute resolution, arbitration is more intrusive than mediation/conciliation in that a third-

party decision maker (or arbitrator) takes control over both the process and outcome of the dispute. It is, however, less formal than litigation in that it is not bound by the same rigid and technical procedures of the courts (Blake, 1992, p. 3).

Although there are a number of forms of ADR, as described in Figure 2.1, arbitration is the only method that offers disputants final and binding results (Livingstone, 2008). Arbitration is defined by Bingham (2004) as being a “quasi-judicial process in which disputants hire a third-party decision-maker, the arbitrator, to adjudicate their dispute” (p.159). As one moves along the dispute resolution continuum from negotiation to mediation/conciliation and beyond, the degree of third-party control over the process and the end result of the dispute are dramatically decreased. In other words, parties having disputes decided by a third party, as in arbitration (and litigation), sacrifice control over the process in exchange for certainty of an outcome. Although disputants sacrifice control the fact that arbitration remains a relatively flexible process, and produces final and binding outcomes, has made it a desirable alternative to litigation (Livingstone, 2008).

Figure 2.1

Dispute Resolution Continuum adapted from Effron (1989).

Arbitration as a system of private justice.

Arbitration is a “creature of contract” (Erickson & Bowen, 2006, p. 44). It is a private and consensual activity between two or more disputing parties (Erickson & Bowen, 2006; Kaufmann-Kohler & Peter, 2001) unlike litigation, which is a public and entirely imposed process. In litigation, parties do not consent to be sued by another party (Erickson & Bowen, 2006). In arbitration, however, only parties who agree through an arbitration agreement may be compelled to have their dispute adjudicated. Further, an arbitrator’s decision is only final and binding on those who are privy to such agreement, or contract (Erickson & Bowen, 2006; Glover, 2005). Unlike litigation, disputants may tailor the arbitration process to meet their needs by agreeing to contract out, or vary, the procedures of the process (Glover, 2005; Blake, 1992). Arbitration’s foundation in contract is thus a source of both its flexibility and efficiency, making it an attractive alternative to litigation.

Although arbitration is said to be a consensual activity between agreeing parties, some forms of arbitration are mandated, or mandatory. This is often the case in labour and employment matters, but it is also the case in sport-specific arbitration. Mandatory or compulsory arbitration, or arbitration without consent as it is variously referred to in the literature (Kaufmann-Kohler & Peter, 2001), still has its foundation in contract, and is still considered by the courts to be a legitimate form of consensual arbitration (Glover, 2005; Kaufman-Kohler & Peter 2001). In the labour context, where employees' rights and interests are protected by a union, the arbitration clause is a bargaining issue typically negotiated in the collective bargaining process (Bingham & Debra, 2000). Employment and sport contexts where neither employees nor athletes³ benefit from union protections, employers and sport governing bodies are able to unilaterally impose arbitration clauses as a condition of employment or competition. Contracts in which terms are imposed on one party by the other are sometimes referred to as contracts of 'adhesion' (Glover, 2005), and are typically based on unequal bargaining positions between the parties.

According to Glover (2005, p. 7), an 'adhesive' contract is one that is "drafted and imposed by a party of superior bargaining strength and which allows the weaker party only the opportunity to accept, or adhere to, the contract or reject it". The mere fact that an arbitration clause may be unilaterally imposed, and thus not necessarily consensual as the word might normally be interpreted and expected in a consensual contract, has not been found to be grounds by a court to invalidate such an agreement (Baxter & Hunt, 1989). A court will only intervene if some provision in the contract is so

³ This precludes those professional athletes who benefit from player union protection.

“one-sided” or unconscionable that it is unfair (Glover, 2005, p. 9). In other words, mandating arbitration in an industry has been seen as a legally fair practice and has historically been an effective strategy for avoiding litigation and directing disputes to arbitration. However, the recently passed *Arbitration Fairness Act, 2009* in the United States has set an interesting precedent regarding mandatory arbitration in the employment and consumer contexts. The *Act* amends the *United States Federal Arbitration Act, 1925* and invalidates arbitration agreements that use mandatory *pre-dispute* arbitration agreements in the consumer and employment situations (*Arbitration Fairness Act, 2009*). It remains to be seen what effect such legislation will have on other jurisdictions and in other industries, such as sport, which also use institutionalized mandatory *pre-dispute* arbitration agreements.

A historical perspective of arbitration.

Historically, arbitration has not always been considered the pragmatic and flexible alternative to litigation it is generally considered to be today (Erickson & Bowen, 2006; Lind & Tyler, 1988; Perry, 2001; Shin, 1998). Prior to the *New York Convention, 1958*⁴ and *UNCITRAL Model Law, 1985*⁵, there existed a tension between the two main models of arbitration – the ‘inquisitional’ model and ‘adversarial’ model. This tension impeded a

⁴ The *New York Convention, 1958* was drafted by the United Nations as a tool to recognize and enforce foreign arbitral awards between contracting states.

⁵ The *UNCITRAL Model Law, 1985* governs International Commercial Arbitration of member states in the United Nations. Article 1.1 stipulates that the Model law shall apply to “international commercial arbitration, subject to any agreement in force between this State and any other State or States”.

universal endorsement of arbitration. Shin (1998) defines the ‘adversarial’ model as “...the tradition of the Anglo-Saxon common law, in which partisan advocates present their cases to an impartial jury” (p.3) and the ‘inquisitional’ model as “...the tradition of the Roman civil law, in which judges take a much more active role in investigating the circumstances of the case” (p.3).⁶ The ‘adversarial’ approach is one wherein parties each present their case (i.e., collect evidence, produce and question witnesses and present arguments to support their case) and the arbitrator sits in judgment between the two cases. The parties are, in other words, adversaries in presenting their cases to the judge. The ‘inquisitional’ approach places the burden of investigation solely on the arbitrator (Shin, 1998). The theory behind the inquisitional approach suggests that parties will suppress information that is unfavourable to their case and the arbitrator, by conducting his or her own investigation, can uncover pertinent evidence and in so doing, adjudicate the dispute more accurately (Shin, 1998). Some view the ‘adversarial’ approach to arbitration to be significantly superior to the ‘inquisitional’ approach because it affords parties an ideal amount of control over the process (Lind & Tyler, 1988; Shin, 1998). Perry (2001), described the shift from ‘inquisitional’ procedures to ‘adversarial’ procedures in the United Kingdom (UK) as the “wind of change...that was necessary to allow arbitration to take its rightful place as one of the leading dispute resolution systems” (p. 93). Although there may be debate over which form of arbitration is most

⁶ This difference in fact distinguishes the common law tradition of law from the civil code tradition of law.

effective, arbitration legislation such as that which exists provincially in Canada⁷ and federally in the United States,⁸ has contributed to the universal endorsement of the adversarial method of arbitration in North America. Contemporary models of arbitration are adversarial by nature and are considered to be a flexible, efficient, and cost saving alternate to litigation, which in turn, is considered a more rigid, costly, and divisive form of dispute resolution (Baxter & Hunt, 1989; Colman, 2003; Erickson & Bowen, 2006; Park, 2003). Indeed, arbitration as a form of ADR has emerged as the desired method of dispute resolution across a number of subject areas, including sport (Beloff, Kerr & Demetriou, 1999; Findlay, 2006; Gardiner et al., 2006; Mew & Richards, 2005; Nafziger, 2004). The remainder of this section of this literature review will focus on the arbitration of sport-related disputes.

In the past two decades the sport industry has increasingly institutionalized the practice of arbitration to hear and adjudicate upon sport-related disputes (Beloff, Kerr & Demetriou, 1999). Sport-specific arbitration can be distinguished by two distinct levels of jurisdiction. At the first or international level, of sport, the Court of Arbitration for Sport (CAS) handles all disputes pertaining to the Olympic Movement (Bitting, 1998; Foster,

⁷All of the provincial and territorial jurisdictions in Canada have enacted legislation to govern the arbitration process. For example, arbitration tribunals conducting hearings in Ontario must meet requirements outlined in the *Provincial Arbitration Act, 1991*.

⁸ Domestic arbitration in the United States is governed by the *United States Federal Arbitration Act* pursuant to amendments contained in the *Arbitration Fairness Act* (*United States Federal Arbitration Act, 1925; Arbitration Fairness Act, 2009*).

2006; Mew & Richards, 2005; Mitten, 2009; Nafziger, 2002; Straubel, 2005; Vetter, 2008). At the second, or national (i.e., domestic) level of sport, a number of arbitral tribunals specialize in adjudicating sport-related disputes. CAS, which is considered by many to be the pre-eminent dispute resolution body in sport at the international level (Bitting, 1998; Blackshaw, 2003; Gardiner et al., 2006; Mew & Richards, 2005; Mitten, 2009; Straubel, 2005; Vetter, 2008), was created by the International Olympic Committee (IOC) in 1984. On the national, or domestic front, a number of countries have introduced sport-specific arbitral processes including the United States (*Amateur Sports Act*, 1978), Australia (Hayes, 2004), Ireland (Anderson, 2006), and Canada (*Physical Activity and Sport Act*, 2003) among others. The following paragraphs will review the advantages and disadvantages cited for sport-specific arbitration.

Advantages of Arbitration

Sport-specific arbitration offers a number of potential advantages over litigation (Baxter & Hunt, 1989; Bickner, Ver Ploeg, & Feigenbaum, 1997; Beloff, Kerr & Demetiou, 1999; Elkouri & Elkouri, 1985; Findlay, 2008; Glover, 2005; Lipsky & Seeber, 1998; Park, 2003). The main advantages have been identified as: confidentiality of proceedings; simplified procedures; reduced costs; finality of proceedings; expediency and flexibility of procedures; expert decision-making; and international enforceability of decisions. As noted by Bingham (2004), although these advantages are widely agreed upon in the arbitration literature, there is a shortage of empirical studies confirming that such advantages are actually realized through the arbitral process (p. 167-168). The following paragraphs will discuss the nature of these 'potential' advantages.

Confidentiality of proceedings.

Unlike litigation, which is part of the public legal process, arbitration is a private matter between contracting parties, thus making the confidentiality of arbitration proceedings possible (Glover, 2005). Such confidentiality is often an appealing feature to parties; however, the duty of confidentiality in arbitration is rarely absolute, and is typically a matter of degree (Hwang & Chung, 2009). First, arbitral tribunals need to consider who is entitled to know about an arbitration hearing and how much about the hearing they are entitled to know. Second, arbitration tribunals must consider what facts, documents, and testimonials should remain confidential (Hwang & Chung, 2009). Confidentiality in CAS and SDRCC arbitrations, for example, is by no means absolute. In both, the arbitral hearing remains a private matter between the arbitrator and disputing parties, however, the decisions of each tribunal are published in the public domain. This is not so in most other sport-specific arbitral forums. In the United Kingdom⁹, for example, parties are given the choice to publish arbitration awards, thus providing users with a higher degree of confidentiality (R 14.2, Arbitration Rules of Sport Resolutions (UK)).

Simplified procedures of arbitration.

In general, arbitral procedures are simplified by conferring decision-making power regarding evidence collection, time for discovery, document production, and the production and cross-examination of witnesses to the discretion of the arbitrator (Blake,

⁹ “Sport Resolutions is the independent dispute resolution service for sport in the United Kingdom, offering arbitration, mediation, tribunal appointments and administration services” (Sport Resolutions, About Us, n.d., ¶ 1).

1992). This allows arbitral tribunals to “avoid becoming bogged down with procedural formalities and technicalities” (Blake, 1992, p. 3), which are the hallmark of litigation. Arbitration can be even further simplified if disputants agree to contract out specific procedures that may be counterproductive to their goals (Glover, 2005). For example, in SDRCC arbitration, parties agree to have their disputes heard according to the rules of procedure contained in the *Code*, (Article, 6.24, *Code*). In sport, urgency to resolve a dispute typically stems from tight timelines imposed by competition schedules (Kaufmann-Kohler, 2001). Essentially, arbitrators are conferred the necessary discretion, and parties are afforded a certain degree of control to help shape the arbitration to fit the unique dispute resolution needs of the parties (Park, 2003). The CAS Ad Hoc Division, which provides on-site arbitration at major or multi-sport games such as the Olympics Games (Kaufmann-Kohler, 2001), is another example in sport where the use of simplified procedures has proven effective. In the context of on-site arbitration, CAS arbitrators have the authority to deliver a decision as quickly as the rules of procedural fairness will allow (Kaufman-Kohler, 2001). The flexible nature of the rules of procedural fairness will allow the Ad Hoc Division of CAS to meet a lower standard of fairness despite a simplification of notice requirements and evidence procedures at games time (Kaufman-Kohler, 2001).

Cost of arbitration.

Costs associated with arbitration are often said to be considerably lower than the costs of litigating claims (Erickson & Bowen, 2006). Typically, the costs of arbitrating disputes are commensurate with the complexity and duration of the arbitral proceedings (Elkouri & Elkouri, 1985). This means that costs are likely to rise as arbitrations become

more complex and court-like. When disputing parties are able to avoid delays and waive timelines, as is possible with the more flexible procedures of the arbitration process, there exists greater potential to lower the costs for the parties. Reduced costs of sport-specific arbitration is one of its most widely cited advantages particularly as most amateur athletes and sports governing bodies simply cannot afford the financial burdens associated with litigation.

Finality of proceedings.

Glover (2005) argues that the arbitration process is, in fact, more ‘final’ than a decision delivered by a domestic court. In most arbitration processes there is no right to appeal to a higher authority and the grounds for an application for judicial review are typically extremely narrow (Findlay, 2006).¹⁰ Arbitration marks the terminal point on the dispute resolution continuum for aggrieved parties in the sense that it is final and binding. For example, parties having a dispute adjudicated by the SDRCC must waive their legal right to request further or alternative relief or remedies from a court to which an appeal might otherwise be made (Article 6.6, *Code*).

¹⁰ The grounds for an application to judicial review remain extremely narrow and domestic courts will always recognize arbitration awards as final and binding on all parties. Domestic courts have a long history of non-intervention and will only interfere if it is reasonable to assume that there was a breach of natural justice that would otherwise prejudice the outcome of the hearing (Bingham, 1996; Blackshaw, 2002; Blake, 1992).

Expediency and flexibility of procedures.

The overall duration or speed of arbitration, from the time a Claimant files the request for arbitration to the actual delivery of the arbitrator's award, may vary considerably from one arbitration to the next. Nonetheless, the arbitral procedure is flexible enough to make the entire process expedient. In sport, there is often need for expediency mostly due to inflexible competition schedules (Kaufmann-Kohler, 2001). Timeliness of procedures is achieved by capitalizing on opportunities to use simplified procedures or, in the case of CAS's Ad Hoc Division, a near absence of procedures (Kaufmann-Kohler, 2001). As such, the arbitral process is inherently far more flexible than litigation. Typically, the procedural aspects of the arbitral hearing are left to the discretion of the arbitrator. It is said such broad grants of discretion are necessary to keep costs down and achieve a just and speedy decision (Park, 2003). Findlay (2008) notes that "arbitration is more responsive and effective than litigation" possessing the required flexibility to cope with the dynamics of the sport industry (p.1). The format of an arbitration hearing is variable. Documentary reviews, expedited hearings before a single adjudicator, or formal almost court-like hearings before a panel of arbitrators are all examples of legally enforceable arbitral hearing formats (Corbett et al., 2008). CAS arbitration divisions reflect such flexibility. A dispute heard by its 'Ordinary Division' may resemble the proceedings of a court of law and are considered "procedurally heavy" (Park, 2003, p. 289) while a dispute heard by its 'Ad Hoc Division' is quite distinct from any notion of limitative legal procedures and can be described as "procedurally light" (Park, 2003, p. 289).

Expertise of arbitrators.

Another frequently referenced advantage of the arbitral process is that arbitrators possess the necessary experience, or expertise, to adjudicate a sport-related dispute. It is an expectation of the SDRCC that appointed arbitrators be experts in the field of dispute resolution and possess a working knowledge of the Canadian sport system (Article 3.2, *Code*). Similarly, CAS *Article S14* requires arbitrators to possess legal training and a recognized competence with regard to sport (*Code of Sports-related Arbitration*, 2010). Provisions such as these are in place to ensure that arbitrators hold the necessary skills to sit in judgment of sports-related disputes, which can be highly technical and specialized by nature (Naziger, 2002).

Enforceability of arbitration awards.

The final widely cited advantage of sport-specific arbitration that warrants discussion is the fact that arbitral awards are recognized internationally through the *New York Convention 1958*. In the sport context, this only applies to awards delivered by CAS as it is an arbitral tribunal with international jurisdiction. If domestic courts did not defer to, or recognize CAS's authority to deliver final and binding awards, a jurisdictional boondoggle would make participation in international competition nearly impossible. *Reynolds v. International Amateur Athletic Federation* (as cited in Naziger, 2002) is an illustration of the need for courts to enforce international arbitration awards. The *Reynolds* case went on for four years, through some fifteen stages of litigation and arbitration and, although Reynolds prevailed, winning a twenty seven million dollar default judgment, the case was eventually dismissed due to lack of jurisdiction (p. 172).

Disadvantages of Arbitration

Notwithstanding the advantages cited above, a number of disadvantages have been associated with arbitration and, more particularly, sport-specific arbitration. Indeed, some of the advantages simultaneously reflect certain disadvantages. Glover (2005) cites four main disadvantages of arbitration: the fact it is a private system of justice, potential for bias, inconsistency between awards, and the riskiness of outcome associated with the process (p.6). It may be fair to say the latter three all stem from the fact that arbitration is a private system of justice.

Inconsistency between awards.

A common criticism of arbitration is that, unlike domestic courts, it does not have a “hierarchy of precedents” resulting in the inconsistent allocation of awards (Glover, 2005, p 6). Despite not being bound by the doctrine of *stare decisis*– which “binds courts to follow previous decisions on similar issues” (Blake, 1992, p.112) there is consensus among scholars that arbitration tribunals should consider past decisions on similar matters of fact (Blake, 1992; Kaufmann-Kohler, 2007). In a survey of cases in the field of international commercial arbitration Kofmann-Kohler (2007) and colleagues, concluded that “arbitrators do what they want with past cases and that there is no clear practice in the field” (p. 362). Some industry sectors, however, such as sport, do rely on former arbitration awards to guide future decisions more than others. In sport, a form of precedent plays an important role in the writing of arbitration awards (Kaufmann-Kohler, 2007). Since 2003, nearly every CAS award has contained one or more references to earlier CAS awards (Kaufmann-Kohler, 2007, p. 365). The 2004 CAS award in *IAAF*

v. USATrack & Field and Jerome Young, CAS recognized the tendency of CAS adjudicators to follow previous decisions wherein the Adjudicator noted:

In CAS jurisprudence there is no principle of binding precedent, or *stare decisis*.

However, a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel. Whether that is considered a matter of comity, or an attempt to build a coherent corpus of law, matters not.

Kaufmann-Kohler (2007) argues that the need to follow former decisions stems from the strong requirement to ensure a level playing field and fairness to athletes in sport, and that performance both on and off the field should be measured by universal standards. Sport-specific arbitration may follow previous decisions more deliberately than other forms of arbitration because the legitimacy of the arbitral process depends on a tribunal's ability to render consistent and predictable awards. Unpredictable and inconsistent results have the potential of eroding the confidence of those who use the system (Kaufmann-Kohler, 2007).

Potential for bias in arbitration.

External influences that are regularly exerted on arbitrators, such as salary and a natural desire to enhance one's reputation, have been empirically proven to affect the objectivity of arbitration. Burgess & Marburger (1993), for example, cite arbitrator re-hire bias (an arbitrators desire to be re-hired) in Major League Baseball (MLB) final-offer salary arbitration as an indicator of the low quality awards that have been produced by that system. In employment arbitration, bias can present itself where the employer is better represented than the employee, the employer has previous experience in

arbitration, and where the employer is in a better position to pay the arbitrator's fee (Bingham, 1997). This phenomenon is commonly referred to as the "repeat player effect" (Bingham, 1997) and is a very robust effect cited in the literature. The potential for bias in sport-specific arbitration stems from the fact that dispute resolution bodies, such as SDRCC and CAS, require their arbitrators to be experienced in the technical aspects of sport and in the practice of arbitration. Arbitrator expertise was previously cited as an advantage; however, the fact that these provisions severely delimit who may be appointed as an arbitrator can be seen as a concurrent disadvantage.

Risk associated with arbitration.

There are some risks associated with arbitration. The fact that arbitration is a private system of justice precludes disputants' access to remedies otherwise available in litigation through the courts. For example, although the SDRCC arbitral process confers to arbitrators, the full power to review the facts and law, as well as the authority to substitute their decision in the place of an original decision (Article 6.17, *Code*),¹¹ SDRCC arbitrators are limited in their capacity to grant remedies. This is true of arbitration in general. Livingstone (2008) claims that arbitrators have only the power to grant certain types of remedies (i.e., they do not have the power to grant equitable¹² remedies, which courts have). Limitations on remedy granting power and a lack of definition of available remedies in SDRCC arbitration (i.e., it is not clear whether

¹¹ This is akin to the power to grant a hearing *de novo* which is conferred to CAS arbitrators

¹² These are discretionary remedies, such as applying for injunctive relief, that only courts have the power to grant.

SDRCC adjudicators may grant 'damages') make predicting the outcome of SDRCC arbitration awards more difficult and more limiting than in litigation.

In a similar vein, arbitration is considered a risk because parties are obligated to waive their right to access the law courts. In order to produce awards that are final and binding on disputants, SDRCC arbitration compels parties to waive recourse to alternative relief to remedies by another judicial or quasi-judicial authority (Article 6.6, *Code*). This includes any appeal to CAS or a domestic or international court.

In summary, arbitration is a private, flexible, and efficient method of dispute resolution. It is also the only method of dispute resolution capable of offering final and binding awards akin to those delivered in courts of law. Sport, like many other industries, considers that, on the whole, the advantages of arbitration outweigh the disadvantages and has thus institutionalized the practice at both the international and national levels.

The following section will examine more closely the mandatory sport-specific arbitration system that exists in Canada.

Sport-Specific Arbitration in Canada

This portion of the literature review will introduce the Sport Dispute Resolution Centre of Canada (SDRCC), and discuss the type of sport-specific disputes adjudicated through its arbitral process. As well, three universal principles of arbitration— party autonomy, procedural fairness and, efficiency of process (Kaufmann-Kohler, 2003) will be used to frame the review of the SDRCC arbitral process.

Genesis of the SDRCC.

The movement to establish a national sport dispute resolution process in Canada was largely born out of the athletes' rights movement of the 1980's. Kidd and Eberts

(1982) made public issues around what they saw as the oppression and denial of Canadian high-performance athletes' rights in sport. They used survey data from 20 NSOs and 16 Provincial Sport Organizations (PSOs) in Ontario to address two central issues – the protection of the rights of high performance athletes and the establishment of a “just system of sport administration” (Kidd & Eberts, 1982, p. 14). Anecdotal evidence from athletes, and analysis by the authors, suggested that high performance athletes in the Canadian sport system were consistently denied basic civil rights.

Beamish & Borowy (1988) subsequently studied athletes' rights in Canada from a labour relations perspective. The authors attempted to debunk ten myths about high performance sport to provide a foundation for their argument that “through their labour, Canada's athletes [are] the heart, soul and backbone of a major, international entertainment industry” (p. 96). The authors used the Ontario *Labour Relations Act* and the commonly used four-part legal test in *Wiebe Doors Services v. M.N.R.* (1986) to support their classification of athletes as employees (Beamish & Borowy, 1988). Despite their argument, Beamish subsequently acknowledged that athlete rights were, at that time, a matter of low priority for Sport Canada and NSOs (Beamish, 1993).

The Commission of Inquiry into the Use of Banned Practices Intended to Increase Athletic Performance, also known as the “Dubin Inquiry”, published in 1990, represents an important turning point for athletes' rights in Canada. In the wake of the Dubin Inquiry came, according to Thibault & Babiak, (2005) “a reorientation of priorities and actions around high performance sport...” by the Canadian government (p. 3). This reorientation addressed a number of concerns regarding the focus of the Canadian high performance sport system. Recommendations directed towards a more ‘athlete centric’

approach to sport administration included, for example, a proposal for the development of an independent dispute resolution centre (Thibault & Babiak, 2005).

The Canadian Sport Council (now defunct) first promoted the concept of an ADR program for the Canadian high performance sport system in 1994, and contracted with the Centre for Sport and Law in 1996 to develop and administer such a system (Haslip, 2001). Due to federal budget cuts the project was disbanded in 1997 before a formal dispute resolution process could be introduced. Nevertheless, an informal, independent arbitration process was managed by the Centre for Sport and Law from 2000 to 2002 (Joudine, 2003). In January 2000, the Secretary of State (Amateur Sport), Dennis Coderre, created a Work Group consisting of members from the sport community, which was charged with researching and exploring the possibilities of, once again, developing a formal ADR program for the Canadian high performance sport system (Canadian Heritage, 2000). Motivated by documented cases of athletes being “unfairly disciplined, harassed, and denied opportunities without proper recourse to a hearing or appeal”, the Work Group developed an approach for changing the face of dispute resolution at the national level of Canadian sport (Canadian Heritage, 2000, p. 2). In 2001, the Canadian Centre for Ethics in Sport (CCES) accepted an offer from the Secretary of State (Amateur Sport) to implement an interim ADR program, called ADRsportRED which operated until 2004 (Haslip, 2001; Joudine, 2003).

In March 2004, the ADRsportRED Steering Committee released a comprehensive report evaluating and assessing the interim dispute resolution program (Canadian Heritage, 2004). The Report recommended that in order for a permanent sport ADR program to be successful, it should be housed in an independent organization governed

by individuals with experience in both sport and dispute resolution (Canadian Heritage, 2004). The system was also to be “national in scope, specific to sport, independent, not-for-profit, affordable, accessible, timely, confidential, where appropriate, and linked to the CAS” (Canadian Heritage, 2004, p. 21). On March 19th 2003, the *Physical Activity and Sport Act, 2003* received Royal assent, officially making the SDRCC the legislatively-mandated authority for dealing with sport-related disputes in Canada at the national level (*Physical Activity and Sport, 2003*).

Sources of jurisdiction of the SDRCC arbitration tribunal.

The SDRCC is an independent organization, which, through a Dispute Resolution Secretariat (Article 10.01, SDRCC General By-Law), houses and manages the arbitration of sport-related disputes at the national level in Canada (*Physical Activity and Sport Act, 2003*).¹³ The SDRCC derives its power (or jurisdiction) from the *Physical Activity and Sport Act*, as well as from two other important sources of law – the *Ontario Arbitration Act, 1991* and the rules and procedures contained in the *Code*. The *Physical Activity and Sport Act, 2003* defines the rules that created the SDRCC, while the *Code* and the *Arbitration Act, 1991* are the sources of jurisdiction for the SDRCC arbitral process (Blake, 1992). The enabling legislation, *Physical Activity and Sport Act, 2003*, contains

¹³ The SDRCC offers several dispute resolution services and, in particular, two distinct categories of arbitration – The Ordinary Division and the Doping Division. The composition of the arbitration tribunal in each example is different and is governed by its own set of rules. This paper is only concerned with the SDRCC Ordinary Division and will refer herein ‘SDRCC arbitration’.

the rules that define and bound the reach of the SDRCC. *Article 10 of Physical Activity and Sport Act, 2003* states:

- (1) The mission of the Centre is to provide the sport community
 - (a) a national alternative dispute resolution service for sport disputes; and
 - (b) expertise and assistance regarding alternative dispute resolution
- (2) For the purposes of subsection (1), a sport dispute includes disputes among sport organizations and disputes between a sport organization and persons affiliated with it, including its members.

SDRCC thus has national jurisdiction in Canada to hear sport-related disputes. The *Physical Activity and Sport Act, 2003* also sets forth information concerning the establishment of the SDRCC; the role, composition, and appointment of its board of directors; and the designation and duties of the chairperson of the Board of Directors (*Physical Activity and Sport Act, 2003*).

The SDRCC *Code* sets out the procedures for arbitration. Blake (1992) describes an arbitral code of procedure as the document that serves as its (i.e., the SDRCC) internal constitution, or constating document. Article 6 of the *Code* is of particular importance as it defines the jurisdiction of SDRCC arbitrations, and articulates the specific rules of procedure that must be followed to conduct a legally binding and enforceable arbitration hearing. The *Code* also contains provisions regarding the appointment of arbitrators, timelines for filing a dispute, and requirements related to the representation of parties (Articles 3.2, 3.5 & 3.11 respectively, *Code*). While the *Physical Activity and Sport Act, 2003* created the SDRCC, it is the *Code* that contains the pre-arbitration hearing rules and the actual rules of the hearing that together, comprise the procedural design of the

SDRCC arbitrations. For a complete version of the *Code* see www.crdsc-sdrcc.ca/documents/eng/CODE2009FINALEN.pdf.

Importantly, the *Code* also dictates the domestic law that shall govern arbitrations (beyond the *Code*). Article 6.24 states: “the applicable law for arbitrations shall be the law of the Province of Ontario and the arbitration legislation in place in Ontario shall be the law of SDRCC Arbitration” (Article 6.24, *Code*). This is a reference to what the literature calls the “seat of the arbitration tribunal” (Kaufmann-Kohler, 2003). The ‘seat’ is a term of art used to define the domestic law governing the arbitration process, regardless of the physical location of the hearing or the residency of the disputants (Kaufman-Kohler, 2003). SDRCC arbitrations are governed by the *Arbitration Act, 1991*, regardless of where, across Canada, they take place.

Type of disputes adjudicated by the SDRCC.

Hayes (2004) uses the expression “sporting dispute” as an umbrella term for two larger categories of disputes: disputes related to ‘external rights’ and disputes related to ‘internal rights’ of aggrieved parties. ‘External rights’ disputes are those “where a party’s common law, equitable or statutory rights are adversely affected” in the playing and administration of sport (Hayes, 2004, p. 23). In other words, disputes concerning an athlete’s ‘external rights’ refer to those disputes where sport and the common law intersect. ‘Internal rights’ are those rights accorded to athletes through Athlete Agreements and are defined by NSO bylaws and policies, i.e., are ‘internal’ to the organization and created by the organization as part of its governance function (Hayes, 2004). Internal rights disputes are those that arise when the rights accorded to an athlete through a sport contract or policy are purportedly infringed. The SDRCC definition of a

“sport-related dispute” is defined in very general terms and suggests that the arbitration tribunal will adjudicate both internal disputes, related to – doping violations, eligibility, selection, rules violation, conduct violation, discrimination, results and outcomes, and membership – and external disputes related to – contract, intellectual property, trade practices, and broadcasting and media (Hayes, 2004, p. 23). Notwithstanding the broad mandate, 118 internal sports-related disputes have been arbitrated through the SDRCC between September 2002 and October 2009, only 1 of which can be described as an external contract dispute. The fact that external rights disputes are typically not adjudicated through the SDRCC is likely a reflection of the design of the SDRCC arbitral process and the newness of the program. Table 2.1 outlines the type and frequency of sports-related disputes heard by the SDRCC.

Table 2.1*Type and Frequency of Disputes Adjudicated by SDRCC Arbitration Procedure*

	2002	2003	2004	2005	2006	2007	2008	2009	TOTAL
Selection	6	7	22	1	2	4	11	1	54
Discipline	0	2	0	2	1	1	0	1	7
Carding	1	2	0	0	1	1	4	1	10
Eligibility	0	1	0	1	1	2	0	1	6
Jurisdiction	0	0	0	²	1	0	1	3	7
Contract	0	0	0	0	0	1	0	0	1
Interpretation of By-laws	0	0	0	0	0	0	1	2	3
Doping	0	0	0	12	5	8	4	2	31

TOTAL	7	12	22	18	11	17	21	11	119
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Reprinted from Findlay and Mazzucco (2010, p. 105).

Kaufmann-Kohler (2003): General Principles of Arbitration as applied to Canadian Sport-Specific Arbitration

Kaufmann-Kohler (2003) identified three universal principles of arbitration which have emerged as a result of the global harmonization of arbitration as a legitimate dispute resolution process: party autonomy, procedural fairness and, efficiency of process. Each principle will be considered in relation to the SDRCC sport-specific arbitral process.

Party autonomy in arbitration.

Party autonomy refers to the degree of control a party has over its consent to engage in arbitration, and over the procedures of the arbitral process itself. As previously noted, control over the arbitral process is widely considered to be one of the advantages of arbitration over litigation. In the Canadian sport-specific arbitral model, however, parties have little control inasmuch as final arbitration of disputes is virtually mandatory. The unilateral inclusion of an arbitral clause by NSOs in both their dispute resolution policies and Athlete Agreements compels athletes to arbitrate their disputes and thereby forfeit their right to seek recourse to other judicial avenues, such as the courts.¹⁴ NSOs are virtually required by Sport Canada to impose such arbitration clauses on athletes as Sport Canada has made recourse to SDRCC part of its NSO funding criteria (Mew & Richards, 2005). The literature on mandatory arbitration shows that this type of

¹⁴ SDRCC Doping Division allows respondents appeal to CAS (Article 7.15, *Code*).

arbitration without consent typically has an adverse effect on disputants' perceptions of the fairness of the arbitration process (Bingham, 2004). Nonetheless, the efficiency of the mandatory model is a compelling rationale for imposing the process (Kaufmann-Kohler & Peter 2001; Glover, 2005). Straubel (2005) and others, on the other hand, take issue with the mandatory nature of sport-specific arbitration arguing that, given the monopolistic nature of NSOs as providers of services to athletes, the unilateral inclusion of an arbitration clause in athlete agreements may be adhesive and unconscionable. Unlike employees who are protected by employment standards legislation, or consumers who may choose another service provider and who are also protected by various forms of consumer protection legislation, the arbitration of disputes is a condition of participation by government supported athletes in the Canadian sport system. Although the mandatory nature of the system is effective in getting parties to arbitration, it is a matter that may require further investigation from an ethical as well as a legal perspective.

Livingstone (2008) writes that disputants, by way of the arbitration agreement, should be able to control which procedures will govern the hearing process. Despite the fact that the sport-specific arbitration model in Canada mandates that athletes have their sport-related disputes adjudicated by the institutional procedures of the SDRCC, parties are still afforded a degree of autonomy over the process, and certainly more than if they were to use the courts to determine their dispute.

Although SDRCC arbitration does not allow disputants to choose the substantive law that will govern a hearing and arbitrators have the discretion to review both the facts and the law of the matter under review, disputants are at least able to control the appointment of an arbitrator, to an extent (Article 6.9, *Code*). Disputants are afforded

some input into the choice of arbitrators by putting forward three names as a possible arbitrator from the list of arbitrators that is published and maintained by the SDRCC (Article 3.2, *Code*). This list contains the names of arbitrators that have been appointed by the SDRCC. The list ensures that arbitrators possess the requisite training, competence, and experience in both dispute resolution (and more specifically, arbitration) and in matters of sport (Article 3.2, *Code*). Although Article 3.2 (b) (ii) of the *Code* indicates that the SDRCC will make every effort to ensure fair representation of “different regions, cultures, genders and the bilingual character of the Canadian society”, currently, only five of the SDRCC twenty-nine appointed arbitrators are female (SDRCC). This is a legitimate point of concern since the arbitration literature indicates that gender bias is a factor in the allocation of arbitration awards (Bingham, 2007). In the event that disputants cannot agree on the selection of an adjudicator, the SDRCC will intervene and select an adjudicator for them. While such selection is done on the basis of a rotating roster, the SDRCC does reserve the discretion to consider issues of language, conflict of interest and geographic location of hearings in the appointment of adjudicators (Article 3.2, *Code*).

Procedural fairness in arbitration.

The second universal principle of arbitration is that of procedural fairness.

Procedural fairness is a fundamental tenet of legal decision-making in sport (Foster, 2006, p. 422). Sport governing bodies must all adhere to the substantive principles of procedural fairness. Foster (2006) maintains that procedural fairness along with other legal principles that apply through the “rule of law” serve as a protection for athletes against grossly unfair or arbitrary decision-making by sport governing bodies (p. 422).

Sport-specific arbitral tribunals exist to review the internal dispute resolution procedures of sport governing bodies for fairness. However, an arbitral tribunal must also ensure that its own review process meets the same minimum standards of procedural fairness (McCutcheon, 2000).

As noted by Findlay and Corbett (2002), Lord Denning's decision in *Lee v. Showman's Guild of Great Britain*, a 1953 decision of the Court of Appeal of Great Britain, is seen as a starting point for considering the legal context for decision-making within sport organizations in Canada (p.110). As a private tribunal making decisions that affect the rights of individuals, the SDRCC must administer all of its arbitration services in accord with the doctrine of procedural fairness (Blake, 1992; Jones & De Villars, 1985). Judicial review is a tool used by the courts to determine if a government or private tribunal that acts in a public way, as sport bodies do as sole governing bodies of a specific sport at the national level, has acted within its jurisdiction and has acted 'fairly' (Blake, 1992; Jones & De Villars, 1985). Unlike traditional appeals to a court, grounds for judicial review are extremely narrow (Findlay, 2006) and typically limited to questions of jurisdiction and procedural errors (Jones & De Villars, 1985). Although there is no specific reference to the doctrine of fairness in the *Code*, the SDRCC arbitral process is nonetheless designed to ensure that objective standards of (legal) fairness are met and maintained throughout. The following paragraphs address the three most

fundamental and absolute principles of fairness: disclosure of the case to be met, right to a hearing and, the rule against bias (Corbett et al., 2008)¹⁵.

Disclosure of the case to be met in SDRCC arbitration. An individual must be informed of the details of the case to be met and be given reasonable notice of any corresponding hearing before such a hearing may commence (Corbett et al., 2008).

Within the context of a SDRCC arbitration, a Request for Arbitration must first be filed and include: names, and contact information of the Claimant and that of the named party (s); information pertaining to the dispute including facts, legal arguments, desired remedy, and proposed solutions; definition of the Centre's jurisdiction; a copy of the arbitration agreement; status of any Affected Parties; language of the proceedings; a filing fee and; the signature of the Claimant and their counsel (Article 3.4, *Code*). Filing a Request for Arbitration must also be done under strict timelines defined by the *Code*.

Once a Request has been filed, the SDRCC informs the Respondent and establishes timelines for the Respondent to file his or her Answer to the Request. An Answer to a Request shall contain the following information: a synopsis of the dispute including, facts, legal arguments, desired remedy, a statement of defence, any counterclaim, and proposed solutions; identification of Affected Parties, a justification for the identification, and their contact information; a position on the inclusion of Affected parties identified in the Request; language of the proceedings and; the signature of the Respondent and their representative (Article 3.7, *Code*). If the Respondent fails to submit

¹⁵ Ensuring fairness can also include providing opportunities to cross-examine witnesses, access to legal representation, reasons for decisions, and a right of appeal (Morris & Little, 1998).

an Answer to a Request in the timelines established by the SDRCC, it will be taken to mean that the Respondent agrees to the terms of the Request and the arbitration will proceed accordingly.

Filing the Request and Answer in accordance to the *Code* serves a critical purpose in the SDRCC arbitral process – that is, to ensure full disclosure of all the facts and legal arguments that are necessary to favourably represent each party's interest in arbitration.

Right to a hearing. The format of a hearing is a flexible concept that can only be executed once the disputants have been given timely notice of the arbitral hearing, and reasonable efforts have been made to ensure that the parties have been informed of all the matters in issue (Corbett et al., 2008). The *Code* contains very little information regarding the format of the arbitral hearing. Article 6.16 defers this to the discretion of the arbitrator, who will set out an appropriate process for the dispute that he or she may be adjudicating (Article 6.16, *Code*). Park (2003) argues a qualified arbitrator can, in fact, ensure that the process will be flexible and timely. He also suggests that broad grants of procedural discretion may be used as an effective tool for navigating around difficult issues of procedural fairness. For example, technical aspects of the hearing process, such as opportunities for adjournments, disclosure, witness production and the right of cross-examination, the power of the tribunal to obtain evidence by compulsion, and the disputants right to make submissions, are all important aspects of conducting a fair hearing, and are typically delegated to the discretion of the arbitrator (Blake, 1992). Only the onus of proof and standard of proof for determining disputes is established by the *Code*. Such procedural discretion does mean that there is the potential for procedural

variation from one hearing to the next. Nonetheless, each hearing must still meet the minimum requirements of procedural fairness, as required by law.

The principles of procedural fairness require that parties be given an opportunity to either defend their interests or make a claim against the opposing party, or both (Corbett et al., 2008). However, the arbitration hearing also serves another important purpose. The hearing provides the arbitrator with an opportunity to consider all relevant evidence concerning a matter, which hopefully results in a better informed decision-maker. Corbett et al. (2008) argue that the spectrum of fairness as it relates to providing the disputing parties with an opportunity to be heard ranges from “simple and relaxed at one end to complex and formal at the other” (p.54). The determination of which type of hearing the parties require is typically left to the discretion of the arbitrator. The arbitrator will look at the nature of the dispute and determine whether a fair hearing is satisfied by a need for in-person court-like proceedings (production of witnesses, cross-examinations, legal arguments, and recorded transcripts) or whether a dispute may be just as fairly reconciled through a simpler and less complicated review of written documents (Corbett et al., 2008).

Rule against Bias. The principles of procedural fairness also serve to protect parties from being prejudiced by biased decision-makers. This principle is referred to in the literature as the *nemo judex* rule, or the rule against bias, which when translated literally means “no man shall be a judge in his own case” (Jones & De Villars, 1985, p. 244). In other words, decisions affecting the rights or benefits of an individual must be made by an impartial decision-maker (Blake, 1992; Corbett et al., 2008; Jones & De Villars, 1985). Corbett, et al. (2008) identify two types of bias that most affect decision-

making in sport. The first, ‘actual bias’, occurs when a “decision-maker is predisposed to decide a matter in one particular way over another” (Corbett, et al., 2008, p.59). The second, “apprehended bias”, occurs where one holds “a reasonable belief, perception, or apprehension that the decision-maker is or may be biased” (Corbett, et al., 2008, p. 60). In SDRCC arbitration, any arbitrator that is selected or appointed to hear a sports-related dispute must disclose any conflict or potential conflict of interest to both the SDRCC and the disputing parties (Article 3.2, *Code*). In the event that a disputing party is able to prove bias or a reasonable apprehension of bias, the *Code* sets out appropriate steps to challenge, remove, and replace the confirmed arbitrator (Article 6.11, *Code*).

Although the principles of procedural fairness are applied variably in sport-specific arbitration, they provide fairness in decision-making for athletes who have submitted to the authority of NSOs and the SDRCC.

Efficiency in arbitration.

Kaufman-Kohler identifies three universal principles of arbitration that frame the operation of the arbitral process. These principles are: party autonomy, procedural fairness, and efficiency of process. The first two principles, party autonomy and procedural fairness, are references to the contractual and procedural law that must be considered in order to conduct a legally fair hearing. The third principle, efficiency, influences and tests the limits imposed by the first two principles. Kaufmann-Kohler (2003) claims efficiency is an important hallmark of arbitration; however, in the context of sport, efficiency in the arbitral process is of particular concern. Sport-related disputes tend to be time-sensitive and require nearly immediate resolution. By imposing and enforcing time limits on parties during the filing period and by granting arbitrators broad

grants of discretion, SDRCC is able to ensure an efficient process. Kaufmann-Kohler (2001) maintains, however, that too much of an emphasis on the principle of efficiency can compromise the fairness of the process. For example, arbitration at major games such as at the Olympic Games is premised on the notion of efficiency. Such arbitrations are heard by the CAS Ad Hoc Division, and decisions are delivered within hours of the filing of a dispute (Kaufman-Kohler, 2001). Principles of procedural fairness, state that “justice must not only be done, but manifestly and undoubtedly be seen to be done” (Jones & De Villars, 1985, p. 224). Kaufman-Kohler (2001) suggests that lower standards of fairness are currently used in games time arbitration without fully knowing a “proper level for the standards” (p.37).

This section examined the legal framework of objective fairness within the context of sport-specific arbitration. The next section explores various models and antecedents of *procedural justice* used to measure peoples’ subjective feelings of the fairness of an arbitral process.

Procedural Justice

There is an important distinction between the concepts of *procedural fairness* and *procedural justice*. In the context of dispute resolution, principles of procedural fairness, as discussed previously, form a legal framework for exercising decision-making power. Adherence to these objective principles ensures that a dispute resolution process will be legally ‘fair’ (Blake, 1992; Jones & De Villars, 1985). However, these objective principles, or procedural safeguards, (Corbett et al. 2008; Howison, 2002) do not guarantee that people who submit to the authority of an arbitral tribunal will perceive the procedure as being ‘fair’ or ‘just’ (Howison, 2002; Sanders & Hamilton, 2000). Research

focusing on this subjective element of fairness exists within the discipline of social psychology and attempts to understand how concerns about justice, which is defined by Sanders and Hamilton (2000) as “moral rightness”, may or may not square with a particular set of dispute resolution procedures.

Although the study of justice as a social phenomenon is not new, social psychologists have only been investigating it since the 1960's (Deutsch, 1983). Justice is not a unitary concept. It is a fundamental concept of social life and is manifest across a number of dimensions (Sanders & Hamilton, 2000). In dispute resolution, for example, justice has been studied from a distributive, a procedural, and a relational perspective. In sport, the concept of justice has been investigated from the perspective of participants (see Greenberg, Mark, & Lehman, 1985; Keenan, 1975; Whisenant & Jordan, 2008) as well as that of management perspectives (see Dittmore, Mahony, Andrew, & Hums, 2009). This review is concerned with the procedural dimension of justice and its relation to dispute resolution procedures in the context of sport. The following section will canvas the literature of procedural justice, specifically, its origins and various models put forward to describe its dynamic.

Origins of the procedural justice dimension.

The term ‘procedural justice’ was first introduced to the social psychology literature by Thibaut, Walker, Latour, & Houlden (1974), who used the term to refer to

the influence of decision-making procedures on perceptions of fairness¹⁶. Prior to this, research on justice was heavily influenced by theories of social behaviour suggesting that people evaluate social experiences in terms of the outcomes they received (Lind & Tyler, 1988; Tyler & Blader, 2003). In dispute resolution, such outcome-based theories attributed a person's perception of justice, or injustice, to how favourable, or unfavourable, a legal or quasi-legal decision might be towards them (Klammings & Giesen, 2008; Lind & Tyler, 1988; Sanders & Hamilton, 2000; Thibaut & Walker, 1975). Such theories formed the basis of the *distributive* dimension of justice. Howeison (2002) identifies three primary distributive justice models: first, those based on principles of equity where outcomes are distributed on a relative basis between people; second, those based on need, where outcomes are distributed on the basis of a person's need; and third, those based on deservedness, where outcomes are distributed on the basis of a person's merit. More recently, theories of justice have evolved to a focus on the relationship between both procedural and distributive concerns for justice (Tyler & Bladder, 2003). Part of the reason for this shift came from research that showed distributive justice judgments were typically biased (Tyler & Bladder, 2003). For example, if a person believed they contributed to a group project to a greater extent than their actual contribution, then their appraisal of a fair distribution of rewards for their work would be skewed. In other words, distributive theories of justice would suggest this person could

¹⁶ Thibaut and Walker are credited by many as being the earliest and most salient contributors to the procedural justice dimension (Bies & Shapiro, 1988; Howeison, 2002; Lind & Tyler, 1988; Sanders & Hamilton, 2000; Tyler & Lind, 2000).

only be satisfied if they received their expected award rather than a reward proportional to their actual contribution.

The procedural justice dimension offered a number of alternative explanations for how people felt about allocation procedures, particularly in the area of procedures of dispute resolution. In general, procedural justice suggests that what people perceive as ‘fair’ treatment in dispute resolution is as much, if not more, a function of the dispute resolution process as it is a function of the outcome of the process (Lind & Tyler, 1988; Thibaut & Walker, 1975). The introduction of the concept of procedural justice to the justice literature in the 1970s and 80s emphasized the notion that the attribution of peoples’ views of fairness turned more on questions of process than on questions of equity, need, or deservedness (see Leventhal (1980) *What to do with Equity Theory? New Approaches to the Study of Fairness in Social Relationships*).

Much of the procedural justice research can be traced through the evolution of three distinct models: instrumental models, which consist of process and decision control theories of procedural justice; non-instrumental models, which consist of voice and ventilating theories of procedural justice; and relational models, which consist of status recognition, trust, and neutrality theories of procedural justice (Howeison, 2002). These models have been summarized in Table 2.2 and are discussed in greater detail below.

Table 2.2*Psychological Models of Justice: the Main Variables that Relate to Perceptions of**Justice and the Psychological Rationale.*

<i>Models of Justice</i>		<i>Main Variables that Relate to Perceptions of Justice</i>	<i>Psychological Rationale</i>
Distributive justice	Equity	Relative Outcome	People are primarily self-interested and seek to maximize their rewards (or resources) from their interactions with others.
	Need	Outcome based on need	
	Deservingness	Outcome based on deservingness	
Procedural Justice	Instrumental	Control: Decision and Process control.	People set out to maximize their control over outcomes in order to maximize their resource gains.
	Non-Instrumental	Voice	People are more concerned with the social aspects of procedures because they believe these aspects can lead to positive feelings about social relationships and self-identity, which in turn creates the perception that the procedure was fair.
		Ventilating	
	Relational	Status	People are focused on the interpersonal aspects of the procedure as they tell people something about whether the group using the procedure values them and this in turn creates the perception that the procedure was fair.
		Trust	
		Neutrality	

Reproduced from: Howeison (2002, p. 10-11).

Models of Procedural Justice

Instrumental control models of procedural justice.

Instrumental control theories suggest that control of the outcome, either directly or indirectly, is essential to produce high feelings of procedural justice in a dispute resolution process (Howeison, 2002; Thibaut & Walker, 1975). The work of Thibaut & Walker (1975) is considered to be a starting point for instrumental control theories of procedural justice (Klammings & Giesen, 2008; Lind, Kanfer, & Earley, 1990; Lind & Tyler, 1988; Tyler & Blader, 2003; Tyler & Lind, 2000). Using controlled settings to test the effects of varying adversarial and inquisitional dispute resolution procedures on participants' perceptions of fairness, Thibaut and Walker found that satisfaction and perceived fairness are substantially affected by factors other than the outcome of the dispute (Thibaut & Walker, 1975). Thibaut and Walker's work identified two factors in particular – decision control and process control, which had an effect on participants' perceptions of fairness (Houlden, LaTour, Walker, & Thibaut, 1978; Thibaut & Walker, 1975; Thibaut & Walker, 1978; Tyler & Bladder, 2003).

Thibaut and Walker (1978) defined "decision control" as "...the degree to which any one of the participants may unilaterally determine the outcome of the dispute" (p. 546). In a dispute resolution process, decision control is particularly robust in bilateral bargaining and mediation because the parties retain ultimate control over the outcome of the dispute. "Process control" is defined as the "...control over the development and selection of information that will constitute the basis for resolving the dispute (Thibaut & Walker, 1978, p. 546). Process control is particularly pertinent in the arbitral process because parties have opportunities to influence the likelihood that the arbitrator will

deliver an equitable outcome, but they may not directly control the outcome itself. Disputants value the degree of process control that a legal or quasi-legal procedure can offer, and an opportunity to present one's case, or voice one's opinion, can enhance perceptions of justice. The effect of "voice" (Folger, 1977, p. 108) is a robust effect across the literature. Ultimately, instrumental control theories of procedural justice suggest that parties value those dispute resolution procedures that offer a degree of control over the process and outcome of a dispute and perceptions of fairness are linked to this perceived ability to influence the outcome of a dispute, either directly or indirectly. (Thibaut & Walker, 1978)

Non-instrumental and relational models of procedural justice.

While instrumental models of procedural justice suggest the positive effects of process control, or voice (Folger, 1977), are dependent on the outcome or, in other words, distributive justice concerns, non-instrumental models suggest 'voice' procedures influence disputants' perceptions of fairness independent of outcome, and focus on parties' feelings of self-esteem and group membership (Howeison, 2002). Lind, Kanfer, and Earley (1990) found that people perceive a process to be fairer if they are afforded an opportunity to voice their opinion, regardless of their ability to influence the decision-maker and the outcome. Essentially, non-instrumental theories of procedural justice shifted the research from an emphasis on voice procedures and outcome to an emphasis on an "individual's concerns about their relationship with social groups and the authorities representing those groups" (Heuer, Penrod, Hafer, & Cohn, 2002, p. 1469). This contemporary model of procedural justice suggests that perceptions of fairness are predominantly influenced by peoples' relational concerns about group membership, and

that feelings of fairness are related to the manner in which people are treated in the whole dispute resolution process.

Heuer et al. (2002) claim that non-instrumental criteria of trust, neutrality, and standing positively influence perceptions of fairness by speaking to an individual's relational concerns within a group. The interaction between person and decision-maker, based on non-instrumental, or relational models of procedural justice, has such a profound effect on peoples' perceptions of fairness that some have identified it as a new, discrete dimension of justice (Klamming & Giesen, 2008). Similar to relational models of justice, interactional justice focuses on the interpersonal and informational components of the process. Interpersonal theories of justice claim that "people want to be treated with respect and dignity and view procedures as unfair if they do not recognize their status as a valuable member of society" (Klamming & Giesen, 2008, p.11). Informational theories of procedural justice suggest that the extent to which people perceive a decision-making process to be fair is influenced by the amount of information available before and during the decision-making process (Klamming & Giesen, 2008). Studies by Colquitt (2001) and Bies & Shapiro, (1987; 1988) for example, show that decision-making models that value interpersonal relationships and disclosure of information result in higher instances of procedural justice.

While three models of procedural justice have been discussed above, Sanders and Hamilton (2000) argue that justice dimensions are interrelated and do not exist as silos. In order to account for variations in procedural justice these models need to be seen as existing on a continuum. At one end of the continuum are distributive aspects of justice

and at the other end are non-procedural aspects of justice, such as informational and relational considerations.

Antecedents or indicators of procedural justice.

Leventhal (1980) was one of the first to study procedural justice outside legal and quasi-legal institutions, and one of the first scholars to develop antecedents, or indicators of procedural justice (Klamming & Giesen, 2008). An antecedent of procedural justice is a specific criterion to which a person's subjective feeling of procedural justice is associated. Although he studied the effects of procedural variations on people's perceptions of fairness in the organizational context, similarities between the legal (i.e., dispute resolution) context and organizational context suggest the relevance of his work in the context of legal and quasi-legal institutions (Klamming & Giesen, 2008).

Leventhal hypothesized that there are six antecedents of procedural justice, which influence peoples' perceptions of fairness (Leventhal, 1980). These antecedents are: consistency, bias-suppression, accuracy of information, correctability, representativeness, and ethicality. Table 2.3 lists each of these antecedents of procedural justice and sets out the underlying psychological rationale of each.

Table 2.3*Leventhal's Six Antecedents of Procedural Justice*

<i>Antecedent of Procedural Justice</i>	<i>Psychological Rationale</i>
Consistency	A person's perception of fairness depends on the extent to which there is consistency in dispute resolution across persons and over time.
Bias-Suppression	A person's perception of fairness is contingent upon a dispute resolution process that is not only free from actual bias, but one that is also able to dispel any apprehensions of bias.
Accuracy	A person's perception of fairness depends on the extent to which decisions by a dispute resolution process are based on fact and as much information as possible.
Correctability	A person's perception of fairness depends on the dispute resolution processes ability to offer degrees of appeal once a decision has been delivered.
Representativeness	A person's perception of fairness depends on the extent to which a dispute resolution process acknowledges the basic concerns, values, outlooks of the disputing parties.
Ethicality	A person's perception of fairness depends on the extent to which the decision-making process should conform to the disputant's personal standards of ethics and morality.

Adapted from Leventhal (1980)

Leventhal also hypothesized that each antecedent of procedural justice can affect a person's perception of the fairness of a process at any particular one of the seven stages of decision-making. Table 2.4 outlines and describes each of the stages of decision-making that constitute an allocation process as explained by Leventhal (1980).

Table 2.4

<i>Seven Stages of Decision-Making Processes</i>	<i>Component Description</i>
Selection of Agents	There should be procedures that pertain to the selection of the person or people who will be responsible for making decisions.
Setting the Ground Rules	The procedures for delivering decisions must be well established and communicated to the receivers of a decision.
Gathering Information	There must exist procedures for hearing the evidence on which the decision-makers reason for making a decision will be based.
Decision Structure	The structure of the final decision must be clearly defined.
Appeals	The process should include some form of appeal procedure that may be accessed by individuals.
Safeguards	Safeguards should be in place to fetter the discretion of decision makers and hold them accountable to their decision.
Change Mechanisms	There should be a set of procedures in place that would pertain to modifying the decision-making process.

Adapted from Leventhal (1980)

Leventhal's antecedents of procedural justice and stages of the decision-making process constitute the theoretical framework for his model of procedural justice judgments, which shifted the focus of the procedural justice discipline from voice to the procedures that make up a process of allocation. Leventhal further explained that a cognitive map explaining an individual's perception of fairness can be drawn by observing the presence of the antecedents of procedural justice at various stages of a decision-making process (Leventhal, 1980). His model is used to establish a detailed account of an individual's perceptions of the fairness of a process of allocation.

Although initially rooted in "...intuition and speculation about what makes a procedure fair" (Lind & Tyler, 1988, p. 131), Leventhal's antecedents of procedural justice have been proven to be very reliable (Lind & Tyler, 1988 & Tyler, 1988). In Tyler

(1988), for example, the author tested the importance of Leventhal's (1980) antecedents of procedural justice and found that his antecedents of procedural justice are indeed capable of accounting for the variance in an individual's perception of the fairness of a process of allocation. More recently, Colquitt (2001) further demonstrated the significance of Leventhal's antecedents by including them in his work, which sought to clarify the dimensionality of organizational justice (p. 390). The outcome of Colquitt's (2001) work indicates that the concept of organizational justice is best explained using a four-factor model of justice consisting of: procedural, distributive, interpersonal, and informational dimensions of justice. Importantly, Leventhal's antecedents of procedural justice, which are defined by Colquitt as "seminal works in the literature" (p. 396) are used in conjunction with Thibaut and Walker's (1975) decision and process-control theory to form the foundation of the procedural justice dimension in this foundational study.

The intuitive nature of Leventhal's antecedents and their focus on the influence of a collection of procedures make his six antecedents an ideal framework for exploring Athletes' perceptions of the fairness of the SDRCC arbitral process.

Chapter 3

Methodology and Research Design

The following Chapter provides a review of the qualitative research design used to explore four Canadian high performance Athletes' perceptions of the fairness of the SDRCC arbitral process through their arbitral experience. Merriam (2009) describes qualitative researchers as being "interested in understanding how people interpret their experiences, how they construct their worlds, and what meaning they attribute to their experiences" (p. 5). It is in this vein that a qualitative research design has been selected as opposed to the more conventional quantitative or experimental research design, which has been typically, and almost exclusively, used to address similar phenomena in the procedural justice literature.

The first part of this Chapter focuses on the theoretical foundations of the research design. The Chapter begins with a discussion of the socio-legal research discipline that forms the foundation of the theoretical rationale for the thesis. It then moves to a discussion of the interpretive research paradigm that defines the lens through which the research will be viewed. It concludes with an explanation of the case study methodology that has been selected to frame the research phenomenon. The second part of the Chapter demonstrates how data was collected, managed, and analyzed. The qualitative interview process, interpretive coding method, ethical considerations, and a discussion regarding the development of the qualitative rigor of the study are also addressed.

Theoretical Rational

Merriam, (1998) defines theoretical framework as "the orientation or stance that you bring to your study" (p.45). In this regard, socio-legal frameworks served to structure

and guide this study. Broadly speaking, socio-legal research is a way of examining the law within a social context. The socio-legal frame is frequently applied in the study of ADR (Travers, 2010) and is, therefore, most appropriate for this study. However, there are other common frameworks used to study systems of law. The first approach to studying law is inwardly focused and used to examine the efficiency of law. Efficiency-oriented researchers study the jurisprudence¹⁷ emerging from legal systems (Deflem, 2008, p. 4). Sport-specific arbitration literature is saturated with jurisprudential research on CAS and the extent to which its decisions are producing a purported *lex sportiva*. The second approach to studying law is evaluative. From this perspective, moral and philosophical underpinnings of a law are used as measures to justify a law (Deflem, 2008, p. 5). The third approach to studying law is externally-oriented and used to empirically study the characteristics of a legal system (Deflem, 2008, p. 5). The sociological approach to studying law “...differentiates between the proclaimed objectives of legal norms, on the one hand, and the actual workings and consequences of law, on the other” (Deflem, 2008, p. 7). The present study is externally-oriented - in that, the purpose of the study is to explore athletes’ perceptions of the fairness of the SDRCC arbitral process. The study goes beyond examining the intended purpose of the SDRCC arbitral rules and accounts for the effects these rules have on athletes’ perceptions of the fairness of the process. Currently, there is a dearth of literature examining sport-specific arbitration from the perception of those who submit to its jurisdiction.

¹⁷ Posner (1990) defines jurisprudence as the “most fundamental, general, and theoretical plane of analysis of the social phenomenon called law” (xi).

Sociology is an academic discipline consisting of several research orientations, or lenses, which are used to study a variety of social phenomenon. The ontological and epistemological assumptions differ with each theoretical lens and influence how a sociologist examines a particular social phenomenon such as the law (Travers, 2010). Fundamentally, a sociologist can study the interaction between society and a legal institution at either a ‘macro’ or a ‘micro’ level. A structural sociologist will study “the relationship between large, complex institutions such as the legal system or the political system and how each shapes the actions of individuals” (Travers, 2010, p. 116). Such socio-legal researchers come from the positivist tradition and value the study of macro legal structures. An interpretive sociologist is concerned with studying the law at a much more local level and will seek to understand “how individuals think about, or make use of, law in particular situations” (Travers, 2010, p. 116). An interpretive lens is adopted for this study, in that the purpose of the research is to explore athletes’ perceptions of the fairness of the SDRCC’s sport-specific arbitration process.

Research Lens

A research lens, or paradigm (Willis, 2007), is “a comprehensive belief system, world view, or framework that guides research and practice in a field” (p.8). There exist three dominant lenses through which qualitative researchers view the world. These are the postpositivist, the interpretivist, and the critical lenses (Willis, 2007).¹⁸ Similar to the

¹⁸ For an overview of the paradigmatic differences and similarities see Guba, E. G., & Lincoln, Y. S. (2005). *Paradigmatic Controversies, Contradictions, and Emerging*

discipline of sociology, each qualitative research lens possesses its own, unique ontological and epistemological assumptions. Willis (2007) explains that ontology is “concerned with the nature of reality (or being or existence)” (p.9). Essentially, theories of ontology are used to define what is real and what is not real in the world.

Epistemology, on the other hand, is the theory regarding the nature of knowledge, and distinguishes several approaches to scientific understanding (Morgan & Smircich, 1980; Bromley, 1986). Interpretive research “assumes that reality is socially constructed, that is, there is no single, observable reality” (Merriam, 2009, p.8). By examining the SDRCC’s sport-specific arbitral process through an interpretive lens, this study broadens the regular discourse of fairness, which is limited to legal standards of fairness, by encouraging a consideration of Athletes’ perceptions of the fairness of the process. Positioning the thesis in the interpretive paradigm as well as applying an interpretive socio-legal framework greatly influences all subsequent aspects of the research design. Specifically, qualitative case study methodology and qualitative interview techniques are used to illuminate and theorize Athletes’ perceptions of fairness in SDRCC arbitration.

Case Study Methodology

Bromley (1986) defines case study as “a general term widely used, especially in the social and behavioural sciences, to refer to the description and analysis of a particular entity (object, person, group, event, state, condition, process, or whatever)” (p. 8).

Similarly, Merriam (1998) defines a case study as “an examination of a specific phenomenon such as a program, an event, a person, a process, an institution, or a social

Confluences. In Norman K. Denzin & Yvonna S. Lincoln (Eds.), The SAGE handbook of qualitative research (3rd Edition) (pp.191-215). Thousand Oaks, CA: Sage.

group” (p. 9). Case study research both benefits and suffers from such definitions (Meyer, 2001). It is clear from these definitions that case studies are used to describe and analyze “single units or bounded systems” (Smith, 1978 as cited in Merriam, 1998, p. 19). Less clear, from a methodological perspective, is how to strategically develop a research design that will best address the bounded system or research phenomenon (Meyer, 2001; Willis, 2007). Merriam (1998) suggests a case study design benefits from a consideration of philosophical underpinnings of the study and the degree to which the purpose of the research matches with the personality and skills of an investigator. In the context of this research study, a single case study design is used to strategically address the research phenomenon. The case study methodology is ideally suited for this study, in that, it is process-centric and deals with the relationship between a particular group of individuals and a specific set of procedures (Merriam, 1998).

Although qualitative case studies vary considerably in their design, Willis (2007) identifies five attributes that a qualitative case study should possess. He writes that case studies should be a) particularistic, b) naturalistic, c) thick in description, d) inductive, and e) heuristic (p.239). For a case study to be *particularistic* it needs to be narrowed so as to focus on a very particular phenomenon (i.e., the single unit or specific phenomenon described by Merriam (1998)). This study is *particularistic* inasmuch as it is only concerned with the arbitral experience of Canadian high performance Athletes. For a case study to be *naturalistic*, the observed phenomenon must unfold naturally or without any influence by the investigator. Although this case study does not provide firsthand accounts of SDRCC arbitration, it examines the recalled arbitral experience of the sample Athletes. When data is *thick in descriptions* it provides explanations for the observed

phenomenon as well as the context in which it happens. In depth interviews are used to collect thick descriptions about Athletes' arbitration experience. For a case study to be *inductive* it must build theories rather than tests existing ones. Although this research is informed by theories of procedural justice, the purpose of this study is not to test theories of procedural justice rather it is to better understand how fair Athletes perceived the SDRCC arbitration process to be, if at all. *Heuristic* case studies learn about a specific phenomenon through the experience of research participants. This case study is *heuristic* in the sense that it provides a foundation to learn more about SDRCC arbitration from the recalled arbitration experiences of Athletes interviewed. The nature of this case study produced the thick, rich data necessary to further an understanding of the relationship between Athletes' procedural justice concerns and the SDRCC arbitral process.

Research Methods

The following section discusses the methods that are used to collect, manage, and analyze the qualitative data. As the study is situated in the interpretive paradigm, data collection and analysis methods, "which focus on meaning in context" have been selected (Merriam, 1998, p.1). Semi-structured interviews were the primary means of collecting data. Each interview was digitally recorded and transcribed verbatim. The raw data was then coded and interpreted for meaning. The data collection process did not begin until approval was received from Brock University's Research Ethics Board ("REB").

Sampling procedures.

The research respondents being interviewed for this study were purposefully sampled (Patton, 2002). Purposeful sampling provides valuable insight to a particular phenomenon that may be lost by other sampling techniques (Merriam, 2009). The select

group of Athletes constituting the sample for this study met four specific criteria: a) they must be Canadian Athletes who are, or have been, members of a NSO, b) must have been a primary party to a SDRCC arbitration between 2002-2010, c) Athletes must be primary parties to a sport-related dispute adjudicated by the SDRCC's Ordinary Division, and d) they can be either an active or a retired Athlete, so long as they adequately meet the first two criteria. Once the purposeful sample was constructed, it was prioritized. Prioritizing the sample helped to identify who was most likely to offer fully developed descriptions of their arbitration experience. The selection criteria and the philosophy of prioritizing those who qualify under the selection criteria ensures that the purposeful sample remains unique (Merriam, 2009) – that is, information is gleaned from a particular group of Athletes affected by a very specific set of arbitration procedures. The study required a sample size range from 3 – 8 participants.

Once the list of prospective participants was created, Athletes CAN¹⁹ was used as a gatekeeper to facilitate the communication process. As the gatekeeper, Athletes CAN distributed the Letter of Invitation (see Appendix C) on behalf of the Principal Investigator to the prospective participants inviting them to participate in the research process. After four official rounds of recruitment, the purposeful sample used for the study consisted of four Athletes. Although this sample size might be considered somewhat small, it fell within the desired range of participants outlined for the study. In

¹⁹ Athletes CAN is an organization whose mission is to “ensure a fair, responsive and supportive sport system for athletes in Canada” (Athletes CAN, Vision, Mission, and Values, n.d., ¶ 2)

addition, the qualitative interview method discussed below produced a great deal of information regarding the research phenomenon (Weiss, 1994).

Qualitative interview method.

The qualitative interview method selected for the thesis makes possible the investigation of the research phenomenon – Canadian high performance Athletes’ perceptions of the fairness of the SDRCC arbitral process – without ever directly observing it. This was the ideal method of data collection for this study, in lieu of the survey method, because of its distinct ability to produce fully developed data (Weiss, 1994). Although on its face, qualitative interviewing seems to lack the structure and systemization of survey interviewing, data gleaned from qualitative interviewing is said to be fully developed (Weiss, 1994), or thick and rich (Merriam, 2009), because research participants are encouraged to respond to unfixed, open-ended questions in ways that are most meaningful to them. The interviews were thus participant driven, which produced an honest and accurate account of the Athletes’ perceptions of the fairness of the SDRCC arbitral process. In qualitative interviewing, it is not the purpose of the Principal Investigator to intervene and introduce personal experiences (Weiss, 1994). Rather, the purpose of the Principal Investigator is to facilitate a collaborative discussion of the research phenomenon through the research participants’ personal experiences.

The best method for conducting a qualitative interview is in-person. The next best method is to conduct the interview by phone (Weiss, 1994). In this study, participants engaged in a sixty to ninety minute semi-structured telephone interview. Telephone interviews, although not as effective as in-person interviews (Johnson, Hougland, & Clayton, 1989 as cited in Weiss, 1994), were necessary to complete the data collection

for this project because the purposeful sample used to conduct the research has considerable geographical spread (Elmholdt, 2006 as cited in Kvale and Brinkmann, 2009). Opportunities to conduct in-person or video conference interviews, although considered, as they may increase the likelihood of gleaning thick, rich data from the sample Athletes were simply not feasible.

Although the telephone interviews produced thick, rich data regarding each of the Athlete's arbitration experience, the length of the interviews may have contributed to response fatigue. Such fatigue might have put an unintended limitation on each of the Athlete's ability to fully disclose the details of his arbitration experience. By limiting interviews to thirty minutes and then returning for a second interview, the Athletes may have been more inclined to further engage in the interview process.

Developing rapport with participants.

Developing rapport between the Principal Investigator and Athletes was integral to obtaining data that was both thick and rich. Research participants needed to know that their confidences would not be used against them and that their commentary would not be misrepresented in the study before they would feel able to open up in the interview process (Merriam, 2009). This was accomplished by contacting and then continually communicating with Athletes in a most professional and collegial manner. For example, Athletes were referred to as "participants" rather than "subjects" (Cohen, Kahn, Steeves, 2000, p. 2). This encouraged and fostered a co-creative, or collaborative, research environment. Since this study relied on the telephone interview method for data collection, there was an even more pronounced need to establish positive rapport between the Principal Investigator and Athletes.

Developing a semi-structured interview guide.

According to Kvale and Brinkmann (2009) semi-structured interview guides “include an outline of topics to be covered, with suggested questions” (p.130). By conducting semi-structured interviews as opposed to structured interviews, wherein the “interview guide is a script, which structures the course of the interview more or less tightly” (Kvale & Brinkmann, 2009, p.130), it was possible to probe and react to serendipitous information provided by the Athletes. For example, if an Athlete’s response to a question was fraught with ambiguity, it was possible to ask follow-up questions (probes) regarding the arbitration procedure and how the Athlete felt about specific aspects of the process. These interpretive probes also helped extract and clarify the true meaning of the responses (Kvale, 1996). The semi-structured interview technique allowed for the exploration of subject areas that were not originally designed as part of the interview guide, but were raised in the interview by the Athletes. Since conducting a semi-structured interview is considered a difficult task for novice researchers (Weiss, 1994) a pilot interview was conducted for this study. The pilot interview was most helpful in confirming the quality and focus of the semi-structured interview guide and interpretive probes. Since the pilot interview revealed valuable information about the research phenomenon it was used in the final reporting of the study. See Appendix B for a copy of the semi-structured interview guide and a list of interpretive probes.

Finally, the audio of each interview was digitally recorded. The purpose of recording the audio of each interview was twofold. First, keeping an audiofile of the interview ensured that none of the data would be lost. Second, the audiofile allowed opportunities to listen for ways to improve future interview techniques (Merriam, 2009).

Transcription and data treatment.

Upon completion of the first interview, the digital audiofile of the interview was transcribed verbatim to capture the factual account of what was said in the interview. Specifically, Leventhal's (1980) six antecedents of procedural justice were used to theorize the Athletes perceptions' of the fairness of the SDRCC arbitral process. A letter code was developed for each antecedent and attached to the data segments in the transcripts to which it related. This analysis process thereby revealed the cognitive map that Athletes unconsciously used to determine whether or not they perceived the SDRCC arbitral process to have been fair. This data analysis strategy combined with a data collection technique that asked Athletes to retell their arbitration experience helped to identify which aspects of the arbitral process most affected their perceptions of the fairness of the process.

Data driven analysis techniques were used in conjunction with the theory driven techniques to facilitate a deeper understanding of the raw data. This analysis approach relates to what Merriam (2009) defines as horizontalization, which is "the process of laying out all the data for examination and treating the data as having equal weight; that is, all pieces of data have equal value at the initial data analysis phase" (p.26). The basic premise behind this technique is to look for aspects that are exactly alike, aspects that differ slightly and clear cut distinctions (LeCompte, 2000). The interview data was coded and analyzed for meaning as discussed above. Meaning interpretation coding allowed the Principal Investigator, as the primary instrument of data collection and analysis, to have a perspective on what was being investigated (Merriam, 2009). More importantly, this form of data analysis allowed the extension of Athletes' thick, rich descriptions about the

research phenomenon as opposed to 'meaning condensation' coding, which calls for large statements to be compressed into brief statements (Kvale & Brinkmann, 2009).

Essentially, segments in the data that directly or indirectly addressed the research questions that are driving the study were identified and interpreted for meaning.

In qualitative research, the process of interviewing, transcribing, and analyzing the data does not happen in an orderly sequence (Merriam, 2009). The fact that these processes happened simultaneously is an indication of the emerging design of the study (Merriam, 2009). Analyzing transcripts between interviews helped to inform each subsequent interview, and helped to narrow the focus of the study (Weiss, 1994). LeCompte and Schensul (1999) data analysis techniques were used in conjunction with the meaning interpretation coding strategy to treat the data and help organize the rich amount of data that came from the interview transcripts. More specifically, LaCompte and Schensul's application of Romagnano's (1991) nine-step method for "tidying up" data was used to organize and store the treated data. For a complete summary of the nine-step method for "tidying-up" data see Appendix A.

Ethical considerations.

Before the interview process was initiated, ethical protocols were considered. It was the Primary Investigator's duty to protect the research respondent's right to privacy, protect him or her from harm, uphold the notion of informed consent, and protect him or her from being deceived (Merriam, 2009). The first ethical consideration of this study dealt with contacting potential research respondents. Despite the fact that SDRCC arbitration decisions are published in the public domain on the SDRCC website, the contact information of disputants is not readily available. To further complicate matters,

the confidentiality policies and ethical mandate of the SDRCC prevented them from volunteering any contact information. An independent third-party was used to contact potential interview respondents. As indicated above, Athletes CAN was used to gain access to potential interview respondents. In this case, Athletes CAN became a “gatekeeper” that was petitioned to gain access to the contact information of desired research participants (Kvale & Brinkman, 2009). Once the organization agreed to participate, an employee of Athletes CAN was given the list of prospective participants as well as the Letter of Invitation that would release those individuals’ contact information if they were interested in participating to the Principal Investigator.

Once potential research respondents had been contacted and invited to participate in the study, each was given the Letter of Informed Consent to sign (See Appendix D). The Letter explained how the information they provided through the interview was to be used in the study. Upon agreeing to participate, each Athlete was assigned a number (e.g., Athlete # 1) to which they would be referred in the reporting phase of the research process in the interest of confidentiality. Even though arbitration decisions are public, the fact remains that this study investigates perceptions of fairness related to the SDRCC arbitration process; therefore, it was imperative to respect their confidentiality. This concern was continually considered during the final write up of the study. These preliminary ethical considerations are based on what Merriam (2009) considers to be ethical issues, which arise at different stages of the research process. In addition, an Application for Ethical Review of Research Involving Human Participants was also submitted to Brock University’s REB, complete with the Interview Guide, Letter of Consent, and Letter of Invitation. Research participants were not approached to

participate in the study until the proposal for the research design and method for collecting data was approved by the thesis Advisory Committee and the REB.

Establishing Qualitative Rigor

Traditionally, the qualitative discipline struggled to legitimize itself as a valid form of academic inquiry because of its focus on local understanding and the acknowledgment that there are several different approaches to ontology and epistemology (Bowen, 2006; Merriam, 1998; 2009). In fact, embracing diversified ontological and epistemological foundations has complicated the way in which some qualitative researchers think about the validity²⁰, or qualitative rigor, of research findings. Since this study explores the perceptions' of fairness of the Athletes interviewed from a socio-legal perspective, establishing the qualitative rigor of the research findings was not achievable by adopting traditional postpositive approaches to validity and triangulation (Ellingson, 2009). One cannot triangulate around a single truth, if one believes in multiple truths and a socially constructed reality (Ellingson, 2009). Crystallization, however, offers an alternative method for developing rigorous qualitative findings. Laurel Richardson proposes:

...that the central image for “validity” for postmodern texts is not the triangle – a rigid, fixed, two-dimensional object. Rather, the central imagery is the crystal, which combines symmetry and substance with an infinite variety of shapes, substances, transmutations, multidimensionalities, and angles of approach...

²⁰ Lather (2007) defines validity as “as the essence of determining what good science is” (p. 5161). The author also claims that in qualitative research the definition of “validity has shifted across time, place, and various fields” (Lather, 2007, p. 5161).

Crystallization provides us with a deepened, complex, thoroughly partial, understanding of the topic. Paradoxically, we know more and doubt what we know. Ingeniously, we know there is always more to know. (Richardson, 2000, p. 934, original emphasis).

As qualitative interviewing and interpreting data for meaning fit nicely with the notion of producing 'crystallized texts', so to do the following strategies for developing the qualitative rigor of the study.

Peer debriefing.

Peer debriefing is the process of using an impartial critique from a colleague to guide the data analysis process (Lincoln & Guba, 1985). This discourse helped to identify and dispel any unintended biases of the Principal Investigator. As well, debriefing with an expert in the field helped to mitigate the fact that the Principal Investigator is a novice researcher. Regular meetings were scheduled with the Principal Investigator's Academic Supervisor. These meetings occurred for continual input throughout the data collection and analysis phases, rather than at the end of the process, where there was the possibility that access to the participants may be lost. The Supervisor was provided with the necessary information (transcripts, audiofiles, secondary data sources, and interview guide) to make informed suggestions regarding the data analysis process. Also, considering the subjective nature of this research, peer debriefing provided a forum for the discussion and clarification of interpretations that may otherwise not have been considered.

Member checking.

Member checking is the process of going back to the research participants to confirm that data was collected accurately and reflects what was discussed in the interview (Lincoln & Guba, 1985). Member checking was conducted after each interview was transcribed. Each Athlete interviewed was emailed a copy of his or her interview transcript and was given two weeks to review it for errors. If the Athlete was dissatisfied with an interview transcript, a follow up interview was to be conducted. Of the four Athletes who were interviewed, none requested that a follow up interview be conducted.

Maintenance of a research journal.

The process of journaling plays an important role in qualitative research. A research journal was created and then maintained throughout the entire data collection and data analysis phases the study. Regular maintenance of the research journal encouraged reflexivity throughout each developing phase of the study. The act of reflexivity is a vital aspect of any qualitative research study. In essence, a research journal can provide a forum for the Principal Investigator to come clean, disclose instances of bias or oversight, and examine the “what if’s” that may have impacted the study. Investing time to document the research process and reflecting meaningfully throughout the development of the study helped to produce a rigorous study by qualitative standards.

Creating a reliable audit trail.

Maintaining an audit trail is another important component to developing the qualitative rigor of the study (Bowen, 2009). Qualitative researchers rely on audit trails to “document chronically and systematically what they did, how they did it, and how they

arrived at their conclusions” (Bowen, 2009, p. 305). To a large degree, this very document constitutes the most significant component of the audit trail used in this study. The research journal also constitutes another important piece of the audit trail. The journal provides a written account of the Principal Investigators thinking process that is otherwise not to be included in the final report of the study.

Summation of the Research Process

In sum, the study used a qualitative research design to investigate athletes’ perceptions of the fairness of the SDRCC arbitral process. Specifically, four Canadian high performance Athletes participated in semi-structured, telephone interviews designed to explore their experience in arbitration. An interview guide, composed of open-ended questions, was used and the interviews were driven by participants’ experiences and interpretive probes interjected by the interviewer to promote the capture of fully developed data (Weiss, 1994).²¹

Once the interviews were completed and transcribed verbatim, two methods of coding were used to help make sense of the raw data. First, theory-driven coding was used to interpret Athletes’ perceptions of the fairness of the arbitral process using Leventhal’s (1980) model of procedural justice judgment. Second, data-driven coding was used to analyze the data beyond the application of Leventhal’s theory. This two-stage method of coding gave depth to the analysis of the interview texts and allowed for the study of insights which were supported by theory as well as those that were not (Kvale & Brinkman, 2009).

²¹ See Appendix B for a complete copy of the semi-structured interview guide and interpretive probes that were used for data collection purposes.

Chapter 4

Findings and Discussion

Summary of Research Findings

This Chapter outlines and discusses the research findings derived from the SDRCC arbitral experience of four Canadian high performance Athletes. Research findings are organized into three sections. Part 1 is designed to explore and unpack the Athletes' perceptions of the fairness of the process. It is divided into two sub-sections each of which discusses one of two distinct coding methods that are used to address the first Research Question. The first sub-section addresses Research Question # 1 (RQ1) by applying Leventhal's (1980) model of procedural justice judgments through theory-driven coding of the Athletes' arbitral experiences. The second sub-section also addresses RQ1 but identifies contextual factors, and an additional antecedent of procedural justice, derived from the data-driven coding that was not captured by the application of Leventhal's model. Part 2 addresses Research Question #2 (RQ2) by considering both the theoretical and emergent data found in Part one. Part 3 addresses Research Question # 3 (RQ3) by using the Athletes' perceptions of the fairness of the process (i.e., antecedents of procedural justice and contextual factors) as a foundation to comment on a number of objective elements of procedural fairness as articulated through the procedural rules of the SDRCC arbitral process.

The small sample size of four persons, and the narrow scope of the study, requires that findings be considered on a relative basis and not treated as categorical evidence for the presence or absence of any procedural justice phenomena. Further research would be

necessary to produce more definitive, generalized, and conclusive results regarding athletes' perceptions of the fairness of the SDRCC arbitral process.

Table 4.1 outlines the three Research Questions for the study and explains each method that was used to investigate each question.

Table 4.1

Strategies for Investigating Research Questions

<i>Research Questions (RQs)</i>	<i>Interpretive Strategies</i>
1. What are Athletes' perceptions of the fairness of the SDRCC arbitral process?	(a) Used theory-driven coding and Leventhal's (1980) model of procedural justice judgment to interpret Athletes' perceptions of fairness. (b) Used data-driven coding to interpret Athletes' perceptions of fairness that could not be explained by Leventhal's (1980) model.
2. How do Athletes' perceptions of fairness reconcile with Leventhal's (1980) theory of procedural justice?	Used a combination of theory-driven and data-driven coding to depict the antecedents that determined Athletes' perceptions of fairness.
3. What do Athletes' experiences in arbitration reveal about procedural fairness?	Used Athletes' perceptions of fairness derived from theory-driven and data-driven analysis to comment on pertinent SDRCC procedural rules.

Athlete Profiles

This section provides a brief profile of each of the four Athletes interviewed, and a summary table of their arbitral experience. Each Athlete satisfied the sampling criteria discussed in Chapter 3 (see page 57) and participated in one or more arbitrations operated by the SDRCC Ordinary Division. The Athlete profiles are relatively general in order to protect each Athlete's right to confidentiality.

Athlete # 1

Athlete # 1 was a member of a mid-sized NSO and participated in two disputes arbitrated through the SDRCC. The first dispute was a selection dispute in which the Athlete participated as an “Affected Party” and was represented by legal counsel. In his²² second dispute, Athlete # 1 was the Claimant in a carding dispute²³ that involved his NSO as the Respondent and fellow athletes as Affected Parties. Athlete # 1 used the *pro bono* legal representation of a friend for this dispute. The Athlete received unfavorable outcomes in both experiences and found his second dispute to be both frustrating and, in his view, unfair. This latter view of unfairness was greatly influenced by his first experience in the selection dispute. His interview transcript revealed that a significant amount of his frustration and perceived unfairness came from trying to compare what he saw to be differences in process between the two experiences.

Athlete # 2

Athlete # 2 was a member of a large NSO and participated in three disputes that were heard by the SDRCC. Two of these disputes, a carding dispute and a discipline

²² ‘His’ and ‘him’ are used throughout the Chapter to refer to the Athletes in the sample. The use of the male pronoun is a matter of convenience and not representative of the Athletes actual gender

²³ The Athlete Assistance Program (AAP) is a Sport Canada athlete funding initiative. Athletes who satisfy AAP criteria receive financial support to train and compete, and are called Carded Athletes (Athlete Assistance Program (AAP), 2009, ¶ 1). Such disputes are thus referred to as 'carding' disputes.

dispute, were heard by the SDRCC Ordinary Division and the Athlete was self-represented. The third dispute related to a doping infraction that was heard by the SDRCC Doping Division. In this dispute, the Athlete elected to be represented by legal counsel. It is important to note, that Athlete # 2's experience with the SDRCC doping procedures may have influenced his overall perception of the fairness of the SDRCC arbitral process just as Athlete # 1's second experience was influenced by his first. Thus, the Athlete's commentary regarding his subsequent arbitral experiences need to be considered in light of what the Athlete viewed to be an unfair and prejudicial experience with the SDRCC Doping Division.. Ultimately, the decision was made to include the Athlete's commentary in the research because of his documented attempts to bracket his experiences within each process during the interview process. As well, the process is the same, although the rules vary somewhat, particularly the onus of proof.

In his disputes, Athlete # 2 received two favorable outcomes in the Ordinary Division and an unfavorable outcome in the Doping Division. Despite the two favorable outcomes, the Athlete is convinced of the unfairness of the process. The certainty of his perception is apparent throughout the interview transcript and most evident when he spoke about the process being unfair for athletes in general, not just for himself. This Athlete was the most knowledgeable of the subjects of the arbitral process and the only one to offer suggestions for improving the fairness of the process for athletes.

Athlete # 3

Athlete # 3 was a member of a relatively small NSO and participated as a Claimant in a discipline dispute. Although the Athlete did not have formal legal representation during the arbitral hearing, he engaged the *pro bono* services of the *Sport*

*Solution*²⁴ prior to his hearing. This Athlete received a favorable outcome in his appeal and demonstrated the most positive view of the fairness of the process. Nonetheless, there were elements of the process that tempered the feeling. This Athlete, like the others, was greatly impacted by the adversarial nature of the process and the effect it had on his relationship with his NSO.

Athlete # 4

Athlete # 4 was also a member of a relatively small NSO and participated as a Claimant in a selection dispute in which he received an unfavorable outcome. The dispute involved his NSO as Respondent along with fellow athletes who participated as Affected Parties. Athlete # 4 participated unrepresented, engaging the services of the *Sport Solution* in only a limited manner pre-hearing. This Athlete demonstrated the most neutral perception of the fairness of the process and seemed to be the most detached from the process. This was surprising because his dispute was the most recent of all those in the sample. Despite the receipt of an unfavorable outcome, the Athlete was also reluctant to call the process either fair or unfair for him and seemed to use the interview process as a way to better understand the complexities of the process.

²⁴ In partnership with Athletes CAN and the University of Western Ontario School of Law, *Sport Solution* provides Canadian athletes with a range of services to help them better understand the fair administration of sport. The *Sport Solution* will provide those athletes who find themselves in the midst of a dispute with their NSO advice on how to proceed accordingly with the matter (Athletes CAN, Sport Solution, n.d., ¶ 4).

Table 4.2 outlines general details about each of the Athletes' experiences in arbitration.

Table 4.2

Sample Athlete Dispute Details.

<i>Athletes</i>	<i># of Disputes</i>	<i>Type of Dispute</i>	<i>Outcome</i>	<i>Representation</i>	<i>Timeframe of Arbitration</i>
Athlete # 1	2	Selection	Denied	Yes	Approx. 1 Week
		Carding	Granted	Yes	Approx. 4 Months
Athlete # 2	3	Discipline	Granted	No	Approx. 6 Months
		Doping	Denied	Yes	Approx. 1 Year
		Jurisdiction/Carding	Granted	No	Approx. 1 Month
Athlete # 3	1	Discipline	Granted	No	Approx. 2 Months
Athlete # 4	1	Selection	Denied	No	Approx. 3 Months

RQ1 (a) What are Athletes' Perceptions of the Fairness of the SDRCC Arbitral Process?

Cognitive mapping of Athletes' experiences using Leventhal's model of procedural justice judgment.

To address the first Research Question, Leventhal's (1980) model of procedural justice judgment is applied to the arbitral experiences of four Athletes. This model uses the procedural justice dimension to explain people's perceptions of the fairness of a process, specifically a process of allocation (Leventhal, 1980). A process of allocation refers to a collection of regulated procedures that are used to distribute a reward or punishment (Leventhal, 1980, p. 34). According to Leventhal, an individual's perception

of the fairness of a process can be mapped by studying the manifestation of six antecedents at various stages of the allocation process (Leventhal, 1980). The six antecedents are: consistency, bias suppression, accuracy of information, correctability, representativeness, and ethicality. In order to apply Leventhal's model to the Athletes' experiences in arbitration, a cognitive map was constructed for each Athlete using theory codes based on these six antecedents of procedural justice. The letter codes were assigned to segments of text to create an individual model of justice judgment for each Athlete.

The following sub-section of the Chapter discusses the Athletes' cognitive maps and examines the extent to which the Athletes' perceptions of the fairness of the process can be explained using the antecedents.

Consistency antecedent. Leventhal's first antecedent posits that individual perceptions of procedural justice are affected by the degree of regularity with which a particular process is applied. Specifically, Leventhal states that any process of allocation "should be consistent across persons and over time" (Leventhal, 1980, p. 40). A process of allocation will be perceived as fairer if the process provides people with the same treatment using the same procedures and if the procedures making up the process are implemented similarly each time they are used (Lind & Tyler, 1988, p. 131). The flexible application of arbitral procedures makes consistency across persons and time very difficult to observe. Although such flexibility may make arbitration an efficient process (Glover, 2005; Blake, 1992), the data indicates that the flexible application of the process affects how Athletes' perceived they were treated during the process. As such, the legitimate exercise of flexibility may be misconstrued as an inconsistency in the application of the process.

Consistency across people. The first aspect of Leventhal's consistency antecedent, consistency across people, is significantly pronounced in all four Athletes' cognitive maps. Athletes compared the way they were treated within the arbitral process to how their NSOs were treated. Differences in treatment were felt in both their interactions with SDRCC administrative personnel in the pre-arbitration phase of the process and with the arbitrator in the hearing phase of the process

In the pre-arbitration phase of the process, Athlete #3 indicates that he was satisfied with the way he was treated by the SDRCC. He said that the SDRCC was "perfect" and that the organization was able to inform each party what to expect in the process. Athlete #3 also suggests that he was appreciative that the SDRCC managed to strike a balance between accommodating parties' schedules and being strict in upholding timelines, stating:

Um, their whole processes, the timelines, the calls when you talk to them, their emails that go out, they are all very professional. Both sides get the emails you know, you know very confidential. It was just, the whole thing seemed to run very smoothly and they knew what they were doing. Everything was done and here is how it will be done. They weren't on the phone like "no you're right we should do it this way...no, this is the way it is going to be." And that is the way it was. They didn't waiver, they made a decision and they stood by it.

On the other hand, Athlete #2 felt that he was treated differently by the SDRCC during the pre-arbitration stage of the process as compared to his NSO. Athlete #2 cited an example of this, whether intended by the SDRCC or not:

I am very well known to the executive director [of the SDRCC] and everybody has my number. But they emailed me the decision to take me to SDRCC to the incorrect email address and then mailed it to the incorrect address as well, and went ahead and held a conference call without me. I was like, come on guys, at some point, if I am not on the call, call me (laugh). Anybody who knows me knows that I am not going to let that go by, so I was very, very frustrated [at] both the organization and SDRCC for not giving me a quick call on my cell phone.

The very different realities experienced by Athletes # 2 and 3 cannot be explained simply by the flexible nature of the arbitral process. The procedural rules that govern the pre-arbitration phase of the arbitral process, although designed to encourage flexibility, provide that both parties participate in any official pre-arbitration administrative calls. The decision to proceed with an important pre-arbitration call in the absence of Athlete # 2 clearly affected his perception of the fairness of the process. This seems to be an example of how some athletes may be treated differently in comparison to other athletes and in comparison to their NSOs.

Feelings of differentiated treatment by the arbitrator also present in the Athletes during the hearing phase of the process. Athletes # 1 and 2 both indicated that they felt they were being treated differently from their respective NSOs by the arbitrator during their hearings. Athlete # 1 explained:

But I clearly felt that when I spoke, or my counsel spoke, the level of attention of the arbitrator was definitely different than with the federation, you know?...He felt the truth was coming out of the mouth of my federation... (pause) that is just [my] feeling, you know...

Athlete #1 goes on to describe an exchange between his NSO and the arbitrator wherein he was unable to challenge the validity of what the NSO was saying. Essentially, he felt the arbitrator was satisfied with the word of the NSO. The situation described by Athlete # 1 may, in fact, reflect a "repeat player effect" (Bingham, 1997). The repeat player effect is explained as a situation in which one party has repeated experiences with the arbitral process, or with a specific arbitrator, and thus has greater familiarity and facility with the process or the arbitrator. This would clearly apply where an NSO engages in numerous arbitral opportunities but the athlete may have occasion to engage in such a process infrequently, and often only once. The repeat player effect is a robust effect as described in the literature and illustrates how an arbitral process may create an accumulated advantage for one party (the repeat player) over another. Athlete # 1's perception may be the very manifestation of this phenomenon in the sport-specific arbitration context.

Athlete # 2 also recalls a situation in which he was treated differently by an arbitrator but in a very different way. Athlete # 2 recalls:

...he [the adjudicator] was one of the ones who asked me if I was a lawyer and when I said no he immediately said "Oh, well then, I am going to do this differently and help guide you through the process". Because he had made the assumption that I was [a lawyer] for the first half day...and as soon as he found out I wasn't, he was much more helpful on a 'here is the steps that we need to go through' kind of a way. He immediately recognized the disadvantage because my association had a lawyer working against me.²⁵

²⁵ This is not uncommon and is, in fact, deliberate.

Athlete # 2, experiences differentiated treatment as a result of the arbitrator's broad grant of discretion to manage the hearing phase of the arbitral process. It may be that arbitrator discretion, in combination with the repeat player effect, creates an environment where athletes perceive they are treated very differently from the NSOs with whom they are in a dispute. Importantly, these Athletes illustrate that such perceived differential treatment can act both for and against the interests of the athlete. In each case, the arbitrator's decision to treat each Athlete differently influenced the Athlete's perception of the fairness of the process.

Consistency of the process over time. The imposition of a strict competition schedule can make the arbitration of a selection or eligibility dispute happen at a faster rate than the arbitration of, for example, a carding dispute, for which there is typically no urgency (Kaufman-Kohler, 2001). Athlete # 1 is the only Athlete in the sample to identify obvious concern for the prolonged time it took to resolve one of his disputes. Athlete # 1 is one of two Athletes interviewed who experienced the SDRCC arbitral process more than once and thus has a basis for comparison. However, he discussed consistency over time in terms of the total time it took to resolve his sport-related dispute and not the inconsistent application of the procedures that make up the process over time. Such a view of consistency is different than the one defined by Leventhal; therefore, consistency over time, as defined by Leventhal, was not found to influence any Athletes' perceptions of the fairness of the process.

Bias suppression antecedent. Leventhal's (1980) second antecedent of procedural justice states that judgments of procedural justice are affected by the perceived presence of bias in the arbitral process. Leventhal identifies two specific forms of bias:

“unrestrained self-interest or devotion to doctrinaire views” (Leventhal, 1980, p. 41).

Both types of bias are accounted for in the data either through direct reference or an acknowledged potential for bias to affect the process.

Unrestrained self-interest. An example of this first type of bias would be a decision-maker who has a “personal self-interest” in the outcome of the decision he or she is making (Leventhal, 1980, p. 41). This type of bias is addressed, at least in theory, by Athlete # 4. His description of the importance of suppressing this form of bias indicates that it plays into his perceptions of the fairness of the process. When asked about fairness in decision-making, he said:

I think that fairness starts with unbiased judgment or unbiased calls from people who are responsible for decision-making. So bias would be, uh, can come from either direction [either in favor of the athlete or in favor of the NSO] and it is hard to find anyone that, or someone that, is totally unbiased. So, there is going to be interferences whether we want that or not. It'll be, uh, a challenge for decision-making. That is my general understanding of fairness in decision-making that I have (pause) because we know that unbiased opinion is hard to come by and we are expecting those biases from pretty much anyone. That's what makes the decision-making tough if you want to maintain that "fairness".

Athlete # 4 correctly identifies the challenge the SDRCC has in providing a process that is free from bias. However, the preceding quote also reveals that the Athlete's perception of fairness is influenced by a very broad and somewhat unreasonable definition of biases in decision-making. In a legal context, the principle of suppressing bias is about

protecting those who submit to an arbitral tribunal from an actual or reasonable apprehension of bias (see review of literature p. 38). However, this broad view of the need to suppress bias adopted by Athlete # 4 (i.e., his procedural justice concern) demonstrates exactly how difficult it may be to convince an individual that a decision-making process is indeed free from bias.

Athlete # 2 indicated that he participated in an arbitral process in which he believed the arbitrator was biased. He recounts, in vivid detail, an action of an arbitrator during the hearing phase that led him to question the objectivity of the arbitrator. In an annoyed and frustrated tone, Athlete # 2 said:

[He] was a hanging judge. Um, you know [he] was not...not an athlete's judge at all. Halfway through the arbitration [he] traveled to lecture to WADA at a plenary in Lausanne. So halfway through my arbitration we adjourned and the adjudicator, um, and the counsel for the [organization] um, um, and one of the key witnesses from the lab [name] all traveled to Lausanne, being paid for by WADA to lecture to prosecutors who were all also flown in by WADA. [His] title address (laugh) was "how to more effectively prosecute anti-doping offences". So the prosecutor went and listened to the adjudicator to learn how to be more efficient in prosecuting you know, amongst others, my doping offence.²⁶ So they, it is like it is such a tight little circle, especially when, not necessarily in the Ordinary

²⁶ In light of the selection criteria for the sample, this Athlete has participated in the SDRCC Ordinary Division process but, as well, the Doping Division process. Comments regarding the doping were not omitted for this research as the whole range of the Athlete's arbitration experiences affect his perception of fairness of the process.

[Division] but in the Doping [Division] but it is very tight-knit and there are adjudicators that are more amenable to the athletes and those that support the system more than anything.

All the Athletes interviewed acknowledged the real challenge with which the SDRCC is faced on the issue. It is important to have adjudicators who are both experts in the law and who have a real understanding of sport and the sport system, as is required by the *Code* (Article 3.2, *Code*). In fact, the use of such “experts” as adjudicators is widely considered an advantage of arbitration in general over litigation (Glover, 2005).

However, this rationale has the potential to create an environment such as the one described by Athlete # 2. The SDRCC standard for appointing arbitrators creates a small fraternity of individuals who possess the requisite legal skills to be an arbitrator and expertise in the sport system. In order to meet the SDRCC standard, it is likely that these individuals have been involved in various aspects of sport, which may create an actual bias, or create a reasonable apprehension of bias, or at least create this impression in the minds of athletes. Suppressing this type of bias in SDRCC arbitrators is an important antecedent in the cognitive maps of both Athlete # 2 and 4.

Doctrinaire views. Leventhal (1980) defines ‘doctrinaire views’ as “blind allegiance to narrow preconceptions...” (p. 41). The extent to which adjudicators are perceived to base their decisions on a so-called ‘doctrinal view of the law’ significantly contributes to the Athletes’ perceptions of the fairness of the arbitral process. The Athletes view arbitrators’ strict application of legal interpretation as a form of devotion to doctrinaire views. Athlete # 2 describes interacting with more than one arbitrator whose focus seemed to be that of maintaining the status quo of the sport system. Athlete # 1, on

the other hand, indicated that his perception of the fairness of the process was affected by the view that it is extremely difficult for an athlete to win at arbitration. This Athlete feels that the narrow scope of review insisted upon by arbitrators in the arbitral process biases the arbitral process against athletes. Athlete # 1 said:

I guess that maybe you know, an overall feeling is the fact that it would take an awful lot of amount of evidence and mistakes from the federation in order to win a dispute and the fact that I feel the arbitrator is there and, you know, he said it in the first report that he is not there to substitute himself or herself for the federation [i.e., NSO]. So, in a way... I guess when you go through an appeal you feel like you're going through a new trial but it is called appeal because you've got to pretty much prove how wrong the federation is. So it's fair but that is maybe the feeling I have a little bit. In a way that... it is kind of not a new decision but you have to prove that the federation has made a very big mistake in order to win the appeal.

Although the *Code* grants arbitrators a broad scope of review in that they “shall have full power to review the facts and the law” (Article 6.17, *Code*), giving them essentially the power of a *hearing de novo*, arbitrators have typically applied a much more narrow scope of review to the arbitral process. Findlay and Mazzuco’s (2010) analysis of SDRCC decisions supports this view, finding that SDRCC adjudicators typically apply the authoritative texts of NSO rules and regulations and refrain from any substantive review of the text in question (p. 20). However, this narrow application of the scope of review is seen by Athletes as a way for arbitrators to protect the autonomy of NSOs. It seems that

Athletes have a difficult time with this aspect of the system, which caused Athlete # 1 to doubt the fairness of the process.

Accuracy of information antecedent. Leventhal's accuracy of information antecedent posits that a decision delivered through a process of allocation should be based on as much accurate information as possible (Leventhal, 1980). Decisions that are perceived to be based on a lack of information, or on inaccurate information, will typically have a negative effect on the perceptions of fairness of those affected by the decision (Leventhal, 1980). The data from the study indicates that there is disconnect between what Athletes consider 'complete and accurate information' and what arbitrators view as 'complete and accurate information'.

Completeness and accuracy of information. Athletes have varied reactions to what information is used, or is necessary, to adjudicate their disputes. Athlete # 4 was satisfied his dispute was determined using complete and accurate information. This is reflected in his statement:

I did not really have to gather much [information]. All I needed for my case was to come up with several emails that were exchanged between me and several other people on the High Performance Committee. Um, [I had to] come up with criteria which were available online -the selection criteria and some other public documents - there wasn't really much other documentation to gather as far as I was concerned.

Athlete #4, however, indicated that the speed of the process was extremely important to his overall perception of the fairness of the process and that he may have been willing to sacrifice accuracy or completeness of some information in the interest of expediency. It is

also possible that the dispute was fairly straightforward and obvious to the Athlete and he may thus have felt confident that the minimal and accurate nature of the information he provided was sufficient for the arbitrator to reach the 'right' decision. In any event, Athlete # 4's desire to move quickly through the process may have contributed to his perceived satisfaction with the nature of the information that was used to adjudicate his dispute.

Athlete # 2, on the other hand, expressed significant dissatisfaction with the completeness of the information used by the arbitrator to come to a decision in his hearing. He suggested that arbitrators may be more interested in promoting and managing an expeditious process than in thoroughly considering all the relevant information.

Athlete # 2 explained:

Not necessarily fair, but that the arbitrators didn't really care one way or the other to get to the bottom of [the dispute]. It was like... [the arbitrator] was, for sure was a 'let's get this over kind of a feeling'. And again, I don't think [he] was listening... I am pretty confident that I explained the difference between a personal record and a, and so on, but I just don't think people listened very well.

This quote is demonstrative of the negative influence the accuracy of information antecedent can have on an individual's perception of the fairness of a process of allocation. In this case, Athlete # 2 has a different view as to what information is relevant during the arbitral hearing as compared to the arbitrator. In addition, when Athlete # 2 spoke about the efficiency and speed of the process in his interview, he acknowledged that the process can move too fast to be considered fair. Such a phenomenon is recognized by Kaufman-Kohler (2001), the drafter of the Ad Hoc arbitration process used

by the IOC on site at major games. She suggests that a need for an efficient arbitration process can compromise the principles of procedural fairness. In this case, Athlete # 2's view indicates that efficiency and speed of the process can negatively affect an athlete's perception of the fairness of the process itself.

Although Athlete # 2 expressed a different view than Athlete # 4 regarding the completeness of information used to arbitrate their disputes, they have similar perceptions regarding the speed of the arbitral process. For Athlete # 2, the fact that the arbitrator appeared to be more interested in managing an expeditious process than in considering all the information the Athlete viewed as relevant and necessary to properly adjudicate the matter, negatively influenced his perception of the fairness of the process.

Correctability antecedent. Leventhal's correctability antecedent posits that an individual's perception of fairness is affected by the extent to which a decision-making process contains provisions for reviewing and correcting purportedly unfair decisions (Leventhal, 1980). In other words, people view a process as being fairer if it offers legitimate opportunities for appeal or review (Leventhal, 1980, p. 43). Such procedures should be readily accessible, enacted without punishment or prejudice, and be free from bias in order to positively influence an individual's perception of fairness (Leventhal, 1980, p.43).

This antecedent has perhaps greater resonance at the level of the NSO because an internal administrative review hearing (i.e., internal to the NSO) may be appealed and subsequently reviewed by the SDRCC. On the other hand, Article 6.6 of the *Code*, prevents parties dissatisfied with a SDRCC decision or award from seeking alternative relief by way of appeal to a judicial body (Article, 6.6, *Code*). The SDRCC process is

'final and binding' subject only to the very limited judicial review process in the event of a procedural or jurisdictional error on the part of the arbitrator. Further, it is unlikely athletes are aware of, or understand, the concept as it is highly technical. For example, Athlete # 4 indicated that his decision to go to arbitration was largely influenced by the fact that SDRCC decisions would be final and binding on both parties (Article, 6.21 (e), *Code*, 2009). No party, and certainly no Athlete interviewed, has ever filed an application for judicial review in the history of the SDRCC arbitral process. Leventhal's (1980) correctability antecedent thus likely has little or no impact on the Athletes' perceptions of the fairness of the SDRCC arbitration process.

Representativeness antecedent. Leventhal's (1980) representativeness antecedent deals with the connection between perceived fairness and the extent to which an individual will perceive an allocation process to be representative of the sub-group of which he is a member. Leventhal (1980) asserts that "... all phases of the allocation process must reflect basic concerns, values, and outlook of important sub-groups in the population of individuals affected by the allocative process" (p. 43-44).

Representativeness can be looked at from the perspective of each of the disputing parties; however, this study considered it from only Athletes' points of view. The data indicates that the representativeness antecedent does influence the Athletes' perceptions of the fairness of the SDRCC arbitral process to the extent arbitrators are perceived to be representative of, or at least sympathetic to, the athlete sub-group. There is, however, considerable variation in the weight the Athletes attach to this antecedent. Athlete # 3, for example, claimed to have strategically selected an arbitrator precisely because he felt the arbitrator was most representative of his interests. Athlete # 3 stated:

Well, the *Sport Solution* guys and even another lawyer, we all agreed that the reason we put him [the adjudicator] on there is because, I guess he has a record of that the NSO is wrong. Um, he or she doesn't hold anything back and if you actually win the case then he punishes them hard in his or her um, in his or her decision. He or she doesn't hold back anything and we were so confident in our case that it would be kinda good if he or she stepped in and ripped them apart type thing.

For Athlete # 3, there is a belief that the arbitrator he selected had a demonstrated history of holding NSOs to account when they violated an athlete's right to procedural fairness. He believes the arbitrator would be likely to favour athletes over NSOs. This particular adjudicator's tendency, at least in the view of the Athlete, to find in favour of athletes, and "dress down" the NSO in the process, gives the impression that he may be more representative of the athlete sub-group than perhaps another adjudicator in the mind of the Athlete.

Athlete # 4, on the other hand, was far less concerned about who adjudicated his dispute. Athlete # 4 felt that a lack of any representativeness, at least in the arbitrator, was most important. His cognitive map suggests that the relative importance he attached to the bias suppression antecedent may be responsible for the decrease in importance he attached to the representativeness antecedent. When asked to define fairness in decision-making, Athlete # 4 stated that the preservation of fairness stems from decision-makers who are "unknown to the system" and the sub-groups within it. Such a feeling requires that Athlete # 4 trusted both the process and the arbitrator to hear his dispute in a fair manner. Athlete # 4 recalled:

Um, knowing these people closer would make this process less fair, from a standard point of view. I guess there is a reason why these people are not known to just any party. Maybe there was someone involved in my case that knew the lawyer [arbitrator] that was involved. I did not. From my perspective it was not really an issue of knowing their backgrounds but having someone that can evaluate, from a legal end, what was provided to them.

This statement may be interpreted that the Athlete placed more weight on the bias suppression antecedent, than he did on the representativeness antecedent. Had representativeness been more important to him, he may have spent time investigating the backgrounds of the arbitrators and, more importantly, learning about their decision-making history (all of which is available on the SDRCC web site). As Athlete # 3 indicates, an adjudicator's decision-making history may reveal tendencies that make an arbitrator more favourable in certain circumstances over others.

Athletes # 1 and 2 share a similar perspective on the matter. These Athletes both question whether the adjudicators possess the requisite 'substantive' knowledge of their sports necessary to make fair decisions in the context of their disputes. They believe that adjudicators who do not possess 'sport-specific knowledge'²⁷ are not representative of the athlete sub-group (i.e., within their sport). For example, when asked to share his opinion of the arbitrator's sport-specific knowledge, Athlete # 1 said:

²⁷ The Athletes spoke of 'sport-specific knowledge' in terms of an arbitrator's ability or inability to understand the technical aspects of their individual sports. As it will be discussed later, SDRCC does not offer a concise definition of the term as it relates to their appointed arbitrators.

...I don't want to go too far. The bottom line is that it is difficult to find an arbitrator that could have any knowledge of the sport that, well obviously they all know hockey, and some of the big sports, but some sports that are more complicated they don't know so that is a difficulty [speaking of his own sport].

In terms of representativeness, Athlete # 2 said:

I guess going back to my example of um, them [previous arbitrators] not understanding the difference between a personal best and an international standard. The feeling I had was just like ahhh...man...like how...and blaming myself for assuming they [the previous arbitrator] would understand that. In hindsight, you look back on the telephone calls and you are like ahhhh (sigh) that is why we are going in that circle for so long. He just didn't get it!

It is evident from Athlete # 1 and 2's descriptions, that they felt the adjudicators did not possess the requisite sport-specific knowledge to come to a fair decision. This perceived lack of knowledge prevented them from feeling as though their interests, concerns, and values were being understood and taken into consideration during the deliberations and in the arbitrator's subsequent decisions.

In sum, Athletes' interview texts reveal that Leventhal's (1980) representativeness antecedent can have a strong influence on the Athletes' perceptions of the fairness of the process. What an adjudicator says and does can profoundly affect the extent to which an athlete will identify with him or vice versa. The data indicates that the representativeness antecedent is important to Athletes. Athlete #s 1, 2, and 3 demonstrate both the positive and negative influence arbitrators had on their perceptions of the fairness of the process.

Ethicality antecedent. Leventhal's (1980) ethicality antecedent states that an individual's perception of the fairness of a decision-making process is connected to his own personal code of ethics (p. 45). An allocation process that runs counter to an individual's personal code of ethics is likely to be perceived as less fair than one that is in-line with such ethics. For example, a process that involves deception, or invades a person's privacy, may be perceived as unfair by those affected by the decision (Leventhal, 1980, p. 46). Although some of the data from the study speaks to Leventhal's ethicality rule, the nature of the Athletes' responses within the interview process limits the extent to which such analysis may be useful. The Athletes were never asked directly to discuss their individual code of ethics, and there is very little data that explicitly speaks to this rule. Athlete # 4 is the only Athlete who speaks, at least peripherally, to his ethical belief system. When asked to define what fairness in decision-making means, Athlete # 4 spoke about the presence of fairness and equity in high performance sport. Athlete # 4 said:

I don't agree with equity in sport and fairness in sport. I believe that if we want to be successful in high performance sport, those two don't really belong as much.
[emphasis added]

The Athlete #4 goes on to say:

Well, ahh, we obviously are guided by rules and criteria and regulations and agreements and contracts. Obviously this all makes our lives easier, but eventually sport is a specific area of our life and some of us that experience sport are...part of the sport (pause)...and eventually once we go past [a] certain point of investing our lives into this business of high performance sport, um, as a federation, or as a country, or as a sport organization, we want to see, um, [the]

most impact for the investment – the most bang for the money. To be more specific, if you have several people who are competing for one spot, um, the best...it is to everyone's best interest to sometimes and not always, but in most cases, in my opinion, it is in everyone's best interest to send the best person at the time, regardless of what agreements or criteria, or regulations were put in place in the selection process. And that, again, goes back to my thoughts about my own situation with the arbitration.

Athlete # 4 makes the point that he believes athletic performance should trump fairness and equity in the administration of high performance sport. He believes that basing selection on performance is the fairest practice in selection decisions. Ironically, Athlete # 4's dispute pertained to his lack of selection to a particular competition. The Arbitrator's decision to uphold the NSO's decision not to select Athlete # 4 violated his personal code of ethics because he was the highest ranked performer in his sport. In his mind, his lack of selection was based on a selection policy that did not focus on actual performance. It is interesting, however, that despite his personal belief that traditional views of fairness and equity do not belong in high performance sport, Athlete # 4 brought an appeal to the SDRCC where the standard of review is that of "fairness and equity" (Article, 6.17, *Code*). Although there is an apparent contradiction, this is likely an example of an athlete's overriding interest in making the team taking precedence.

The limited nature of the data regarding Leventhal's (1980) ethicality antecedent makes understanding its influence on the Athletes' perceptions of fairness difficult. However, Athlete # 4's interview text does suggest that there may have been some

disconnect between his personal code of ethics and that which is reflected in the NSO selection policy.

Summary of Leventhal's (1980) antecedents of procedural justice.

Leventhal's (1980) six antecedents of procedural justice are helpful in explaining or unpacking people's perceptions of fairness because they focus on specific aspects of an allocation process (Leventhal, 1980). In the context of this study of a sport-specific arbitration process, only five of Leventhal's antecedents of procedural justice appear to be particularly relevant. Consistency, bias suppression, accuracy of information, representativeness, and ethicality variously affected the Athletes' perceptions of the fairness of the SDRCC arbitral process.

RQ1 (b) What are Athletes' Perceptions of the Fairness of the SDRCC Arbitral Process?

Emergent data influencing the Athletes' perceptions of the fairness of the process.

This section of the Chapter presents and discusses the emergent data that was found to influence the Athletes' perceptions of the fairness of the SDRCC arbitral process, but which could not be captured by the application of Leventhal's model. For this, data-driven coding was used to deconstruct the Athletes' experiences and identify three contextual factors, and one additional antecedent of procedural justice that influenced their perceptions of the fairness of the process. The three contextual factors are: a perceived desire for an efficient process; a perceived power imbalance inherent throughout the arbitral process; and, acknowledgement of an adversarial environment

with measurable effects on relationships. The additional antecedent is a perceived desire to be heard within the process.

The Athletes' interview text was coded line by line and ninety one codes were used to interpret their experiences. Once the segments of text were assigned codes, similar data codes were organized into nine general categories that related to the Athletes' perceptions of the fairness of the process. The nine coded categories were refined into four comprehensive themes. Three of the four themes represent contextual factors, unique to the arbitral process and which seem to influence Athletes' perceptions of the fairness of the process. The fourth theme relates to an additional antecedent of procedural justice that is well represented in the literature but not an explicit component of Leventhal's model. The identification of these contextual factors, or environmental conditions, as well as the additional antecedent, was not based on the frequency with which they appeared in the data. Rather, they were deemed to be of significance based on the level of relative importance, or weight, the Athletes gave them through their responses. This was determined by interpreting not only what the Athletes said in the interview, but by also focusing on how they said it. The following sections identify and discuss the emergent data and interpret them in terms of their influence on the Athletes' perceptions of the fairness of the SDRCC arbitration process.

Perceived desire for an efficient arbitration process. Athletes' desire for an efficient arbitral process is one of the strongest and most universal themes found in the data. It clearly and significantly contributes to the Athletes' perceptions of the fairness of the process. As described in Chapter 2, efficiency of process is considered to be one of, if not the most, widely cited advantages of arbitration over litigation. The timely resolution

of a dispute by means of arbitration is said to be achieved through the use of simplified procedures (Kaufman-Kohler, 2001), broad grants of discretion to arbitrators (Parker, 2003), and the opportunity of parties to dictate timelines (Glover, 2005). Strict timelines imposed by the competition schedule makes efficiency particularly important in the arbitration of some sport-related disputes (Kaufmann-Kohler, 2001). *Beaudet v. Federation of Canadian Archers (SDRCC 08-0083)*, provides a detailed example of the efficiency of the SDRCC arbitral process. The Claimant athlete requested that the case be heard as quickly as possible. The day after the Claimant's request for arbitration was filed, the preliminary administrative teleconference call was held. The hearing was completed 4 days later and the written award with reasons was delivered to parties one day later. From start to finish, the process took seven days. This is an example of just how efficient the SDRCC arbitral process can be handled in comparison to a court proceeding, which is typically bound by strict rules of procedure and can take an extended period of time to complete (Blake, 1992). However, not all SDRCC arbitrations proceed in such an efficient and timely manner.

Athlete #1, who has had two disputes arbitrated through the SDRCC, perceived his second arbitration, which was handled in a far less efficient and timely manner than the first, to have been considerably less fair. Athlete #1 explained this perceived unfairness stating:

And you know, I really felt like the most recent decision wasn't fair for me....they [SDRCC] certainly didn't seem to have any feeling of urgency for the matter. I mean, again, I lived it twice and the first time it took a maximum of 72 hours and everything was done. It was over. I mean, I understand that carding isn't as

important as an Olympic [selection] appeal, but four months? ...Again, it is [a] rather different situation and, in particular, as I mentioned, I lost and I have to accept the verdict. But you know, I felt particularly bad for the two athletes that couldn't get their carding money for four months.

Athlete #1 acknowledges that the nature of a dispute will have an effect on how efficiently a dispute may be resolved. His first dispute involved an Olympic team selection. In the second dispute he was a party to an Athlete Assistance Program (AAP) 'carding' dispute. In the first dispute, efficiency can be critically important depending on time constraints imposed by the competition schedule (Kaufmann-Kohler, 2001). Carding disputes on the other hand, may be perceived as less urgent since the only consequence of a prolonged process is a delayed AAP payment to an athlete. Nonetheless, in Athlete #1's case, the difference in the time to process the disputes was, in his view, so significant that it negatively influenced his perception of the overall fairness of the process.

Athletes #3 and 4, on the other hand, stated they were satisfied with the efficient manner in which their disputes were handled. In an appreciative tone, Athlete #3 described the firm yet accommodating nature of the SDRCC staff in managing the pre-hearing process, stating:

Um, it was all...the SDRCC was perfect. Whatever they said you know ... here is the time... they were very strict or you had to ask for more time type thing... Yeah, as soon as one of the parties asked for more time, or another day, or to extend it from 9am-5pm type thing, they were allowed to, 'cause I know the NSO asked for that once. I think they said "we want this at the end of the day and not the beginning of the day" type thing.

Athlete # 4 indicated that his primary motivation for bringing his dispute to arbitration was that it produced expeditious results. The Athlete acknowledged that, although the pre-arbitration process took several weeks due to scheduling issues, the actual hearing moved very quickly. Athlete #4 cited arbitrator discretion as the reason for his timely hearing:

Um, next actually that is where things moved most quickly. The arbitrator contacted all the parties involved, um, there were some requirements to send consent, um, administrative work was done, um, and once they got control of the process we basically got a couple dates to choose from for conference calls. I believe it would have been one week or two weeks maybe that the arbitrator gathered the information he wanted and within a week after that a decision was made. So that was the attractive part of the whole process, it did not take forever...it was a pretty swift process.

Finally, Athlete # 2 perceives efficiency and speed of the process as both a positive and negative feature of sport-specific arbitration. When asked about the fairness of the process, Athlete #2 said:

Um, one of the things is the speed that it happens at. It is a bit of a double-edged sword. In some instances it was really good that it went fast but in other instances they really, really push you hard. Again, it is...if you are self-represented and you are working you know...especially...you know, give me an extra week to go and research and figure out my argument because this isn't what I do every day and so there, if there could be a little more flexibility on the timelines...um where I have

asked for more time and it was "No, the rules say we have to go within ten days or within however many days". That was a little frustrating.

In summary, efficiency and timeliness of the arbitral process is widely considered an advantage of arbitration as a form of dispute resolution. Three of the four Athletes' responses reflect this position. The alternate view expressed by Athlete #2, is one also supported in the sport-specific arbitration literature. There exists critical literature that challenges the pervasive view of efficiency of process as being a solely advantageous attribute of the process. Kaufman-Kohler (2001) argues there is a real danger that an over-emphasis on the principle of efficiency can put pressure on other fundamental tenants of fairness, such as the right to disclosure of pertinent documents and, most importantly, the right to a full and fair hearing. Such pressure can easily arise in the resolution of sport-related disputes at the Olympic Games where the Ad Hoc Division of CAS may hear and resolve a sport-related dispute in a matter of 24 hours (Article 18, Arbitration Rules for the Olympic Games, 2010). The data indicates that efficiency of process can have either a positive or a negative influence on Athletes perceptions of the fairness of the process depending upon an Athlete's view of the circumstances. Nonetheless, greater emphasis on the principle of efficiency typically comes at the expense of the fairness of the process and, in some cases, the perceived fairness of the process.

Perceived imbalance of power inherent throughout the process. Another strong theme contained within the data is the belief that the Athletes are considerably disadvantaged in comparison to the NSOs in the SDRCC arbitral process. Athlete accounts of perceived disadvantages have been interpreted to be indicators of an inherent

imbalance of power that exists in the current SDRCC arbitral process, and in sport generally. This imbalance of power, which manifests as a lack of resources available to the Athletes, stems from the fact that the Athletes reportedly face both real and perceived barriers in obtaining representation and accessing information about the arbitral process. These manifestations are sometimes explained in the arbitration literature by the repeat player effect. Bingham (1997) indicates that in employment arbitration, which may be seen to some extent, as similar to the circumstances of sport-specific arbitration (see review of literature p. 23); the employer typically has access to superior representation services and has more knowledge about the process than the employee. In essence, those who are repeat users of an arbitral process, such as an employer or, in this case an NSO, benefit from an accumulated advantage that results in a power imbalance between the two groups. The following paragraphs examine the imbalance of power inherent in the arbitration of sport-related disputes between the Athletes and their NSOs as reflected through their recalled arbitral experiences.

Access to Representation. All Athletes interviewed for the study, except for Athlete # 1, participated in an SDRCC arbitral hearing unrepresented. Athlete # 2, who participated in three SDRCC arbitrations, had representation in one of his arbitrations. The cost of an arbitral proceeding is often cited as an advantage of the process over litigation (Elkouri & Elkouri, 1985; Erickson & Bowen, 2006); however, all Athletes cite cost of retaining legal counsel as the most significant deterrent to seeking representation. The Athletes experiences reveal that the cost of arbitral proceedings should only be seen as relatively inexpensive when compared to the cost of litigating a dispute. This is an important issue in terms of the perception of fairness as the data also indicates that going

through the process unrepresented has both legal and psychological consequences for the Athletes.

Athlete # 2 has strong feelings about the high cost he had to incur to retain the services of legal counsel for the arbitration of his dispute. Discussing challenges that an unrepresented athlete may face, Athlete # 2 says:

...so just even understanding, you know, what the grounds could be for a thing is a stumbling block, and you pair that with the fact that most athletes can't even afford a lawyer to go in and do these things for them, but if they did it would be explained to them. Generally, you can always find a procedural ground if you know what you're looking for and if you have a background in law, but athletes just don't. And that was why I was self-represented on the carding thing because the decision was ultimately was going to be an \$18,000 decision. If I had lawyers fill out that form that would have been 1,200 bucks. Is it worth it? No, absolutely not [emphasis added as reflected in the interview tapes].

Along with the expense of retaining legal counsel, Athlete # 2 touches on some objective consequences an unrepresented athlete may face. Specifically, he speaks about the difficulty an unrepresented athlete may have in filing a Request for Arbitration (Article 3.4, *Code*) or an Answer to Arbitration (Article 3.7, *Code*). These filings require an athlete to set out the grounds upon which he is bringing his dispute and provide a summary of the case. As Athlete # 2 indicates, this may be a difficult process for an athlete with little legal expertise and who may be experiencing the arbitral process for the first time as the forms require athletes to cite the legal grounds for proceeding with arbitration. As sport-specific arbitration exists to review NSO decisions for fairness, the

grounds for initiating an arbitration proceeding relate to substantive and procedural errors in the decision in question. Although there is no requirement to bring an appeal on the basis of specific grounds, SDRCC arbitrators typically apply four forms of interpretation in their decision-making process (Findlay & Mazzuco, 2010). Such adherence to these forms of legal interpretivism makes the process increasingly legalistic and difficult to navigate without any legal training. If legal counsel were more available to Athletes, they might better understand why SDRCC arbitrators adopt a narrow scope of review as opposed to the broad scope granted to them through Article 6.17 of the *Code*.

Athlete # 2 is not alone with his concerns about the cost of retaining legal counsel. The other Athletes also acknowledged that retaining legal counsel would exhaust their financial resources. Athlete # 1 claims that had he not benefited from the *pro bono* work of a friend, he would have had to have gone through the process unrepresented. Athlete # 1 said:

I was fortunate that this person did it *pro bono* but you know it is still someone I know and I know what it costs and how much he charge[s] an hour. He lost money working with me for sure (laugh). You know, he didn't charge me but you know there are a couple costs involved and just the time we spent. And for the guys [Affected Parties] I think their lawyers did it *pro bono* but that doesn't matter because these guys spent time that is worth money to them.

Athlete # 3 and 4 also could not afford to retain legal counsel. These Athletes did, however, engage the services of the *Sport Solution*. The following paragraphs explore both Athlete # 3 and 4's experiences working with *Sport Solution*.

The *Sport Solution*, although providing *pro bono* services to national level athletes, does not provide athletes with actual legal representation. It only provides athletes with an opportunity to be guided by law students who are informed about the SDRCC arbitral process but who do not have the authority to practice law. The *Sport Solution* was engaged by these Athletes in very different capacities. At several times during the interview, Athlete # 3 references, in detail, the degree to which he relied on the organization's Program Managers for help. Athlete # 3 recalled:

Sport Solution um, he helped me like, like, it was unbelievable how they helped me. Um, well, kinda to figure out what the NSO was actually doing. Umm, they helped me um, um, present my appeal where it would actually be heard and not just thrown out or something. Um, he helped me, well the *Sport Solution* helped me understand the policy from our NSO. Like our Athlete Agreement and the player policies and all that. To be honest with you, I, I was on the committee that helped build the policy so I had a little bit of insight but I had no idea like - I am not a legal person so I didn't really understand the ugh, you know the language and stuff like that.

His perception of the fairness of the process was positively influenced by the quality of help he received from them. Athlete # 4, on the other hand, mentions the *Sport Solution* in passing and consulted with the Program Managers only about whether or not he should appeal the NSO decision to the SDRCC. Athlete # 4 recalled:

So I did contact them [the *Sport Solution*] and they directed me towards the arbitration as an option, giving me a little bit of feedback of their sense of the situation based on what I provided them with.

Based on Athlete #4's interview text and the Arbitrator's summary decision in the dispute, it is the Principal Investigator's view the Athlete would likely have benefited from the fuller services of the *Sport Solution*. Specifically, Program Managers from *Sport Solution* would have been able to inform the Athlete how to strategically select an arbitrator to hear the dispute.

In any event, a lack of experienced counsel negatively influences Athletes' perceptions of the fairness of the process. A review of the entire Athletes' interview texts reveals feelings of unfairness, dissatisfaction, frustration, and even anger regarding the lack of resources made available to them to retain legal representation. Athlete # 2's experiences, for example, have led him to believe that athletes should be strongly discouraged from undertaking the arbitration process unrepresented and that more should be done to address the power imbalance inherent in the current SDRCC arbitration process with regard to representation. It is an unfortunate reality of the process that, although SDRCC arbitration exists as an alternative to litigation in part to keep financial costs to a minimum, many athletes simply do not possess the resources to retain legal counsel during the process. It should be noted, however, that since interviews were conducted for this research, the SDRCC now offers *pro bono* legal services to athletes engaged in the SDRCC arbitral process (SDRCC, Dispute Prevention Resource Centre, n.d.).

Access to Information. The second manifestation of the perceived power imbalance that exists in the SDRCC arbitral process relates to the type and distribution of information about the arbitral process, particularly prior to the initiation of the process. The following section explores Athletes' views concerning this type of information and

methods currently used to distribute information to athletes by the SDRCC and other stakeholders such as Athletes CAN.

The perceptions of the fairness of the process of Athletes # 2, 3, and 4 are affected by the nature of the information about the SDRCC arbitral process itself and how it is delivered to athletes. Athletes # 3 and 4 share similar positive views regarding the distribution process, while Athlete # 2 voices his concern for, what he perceives to be, an absence of an institutionalized method of delivering arbitral information to athletes.

Athlete # 3 makes a connection between how fair he perceives the arbitral process to be and the availability of information about the process. He was satisfied with the information provided to him by the SDRCC once he had initiated the arbitration process. He said:

To me, I think it means like, um, having both parties, but usually in our case, the athletes case or side, I mean I didn't know much about the law or anything and I think fairness was giving or having an opportunity to for, uh, either the SDRCC, or whoever, it was to kinda explain uh, a lot of stuff so we understood it. Having a body or a person like the *Sport Solution* for the athlete really helped. For me, if I would have went in blind, I probably would have lost because I probably would not have known what I was trying to talk about or how to, umm, you know, organize everything.

Although Athlete # 4 does not make the same explicit connection between the fairness of the process and the availability of information, he nonetheless claims to be satisfied with the nature of the arbitral information that was provided to him prior to his hearing. When

asked about his knowledge of the process prior to having his dispute adjudicated, Athlete # 4 said:

I had a vague idea. I wasn't familiar with it specifically but, um, I was explained the process fairly well...They [SDRCC] gave us good explanation of what was involved. I think it was enough for me to be comfortable with it... I had a very positive experience. Whatever the process, apart from the flaws of the process, the way I see them, the organization gave us good instructions and good indications about what to expect.

The Athlete was “comfortable” with the way in which he was informed about the arbitral process and thus the method of delivering information to the parties did not have an adverse effect on his perception of the fairness of the process.

The perception of the fairness of the process for Athlete # 2, however, is negatively affected by what he considers to be an absence of any consistent method of delivering information about the SDRCC arbitral process to all athletes and, more importantly, to athletes who are engaged in a sport-related dispute. When asked what he knew about the SDRCC arbitration process prior to his first dispute, Athlete # 2 said:

hummm, that is a tough question...I don't know that (pause)...I guess I expected it to be um, um,it would of been nice for it to be better explained because going in the first time, um, I had no idea of what to expect and again I had no idea or very little idea of, um, what was expected of me as an athlete. Again, there is no, um, um, no guiding document to help athletes through the process. Nothing to explain the arbitration 101 document... But there really needs to be by that kind of thing written by a truly independent person who doesn't have a vested interest in,

in representing either side. Or maybe has a vested interest in, if it is a document for the athletes, has a vested interest in representing the athletes. I would rather have that than someone who is going to work as a prosecutor against the athletes writing an advisory document for athletes.

When Athlete # 2's feelings were further explored, he indicated that more information about the process needs to be made available to athletes prior to the filing of a Request for Arbitration because of, what he perceived to be, the legalistic nature of the arbitral process. Athlete # 2 claimed:

If you put yourself in that situation [arbitration] without a law background, and maybe you know a little bit about it because, you know, because, in my situation I have a brother who is a lawyer and I have uncles and so on, but the law, and any kind of process associated with a legal or a quasi-legal matter, has a lot of procedural things you have to do; and you to do things in the right step and in the right order. There is no 'tool box' for athletes in, "here is how to fill out this form", "here is what constitutes grounds for, um, an appeal", "and here is the difference between evidence, between evidence and testimony". All of these things where... and...I'm in a bit of an awkward position because I kind of understand them...athletes don't understand what a ground is. It is as basic as that.

Specifically, such information needs to address exactly how the arbitral process works, when it may be beneficial for an athlete to pursue arbitration by identifying potential remedies available to an aggrieved athlete, how to file the application and then proceed with the process, and how to present evidence and articulate one's case to an arbitrator. Athlete # 2's interview text strongly suggests that a formal method of delivering such

information to him would have greatly improved his perception of the fairness of the process. In order to address this concern, Athlete # 2 recommends the establishment of an ombud's office responsible for overseeing athlete/NSO disputes and for providing athletes with information about the process, as well as facilitates access to legal counsel. Athlete # 2 firmly believes that the creation of such an office would "level the playing field" between athletes and NSOs in terms of access to both representation and information.

Athletes # 3 and 4 may have expressed satisfaction with the information they received, as well as the method of delivery, because the NSOs with whom they had the disputes, had no prior experience in arbitration.²⁸ Both parties (i. e., the athlete and NSO) were equally inexperienced and received similar information about the process from the SDRCC prior to the arbitral hearing. Despite this, Athlete # 2's perception that access to information regarding the arbitral process reflects a power imbalance that exists in the Canadian sport system between athletes and NSOs should not be lost. The data shows that this power imbalance is greater when athletes are in the position of arguing their cases against NSOs who have had prior SDRCC arbitral experience and access to legal representation. The advantage of experience and representation can thus not be ignored, and it may be that early access to information about the process may be necessary to narrow the gap between these two groups.

In sum, it seems that in certain situations some Athletes perceived the existence of an imbalance of power in the SDRCC arbitral process. This imbalance manifested itself

²⁸ Athlete # 3 and 4 each indicated in their respective interviews that their NSOs had no prior experience with the SDRCC arbitration process.

as a lack of access to representation and/or access to information regarding the arbitral process. In terms of representation, all Athletes indicated that the cost of retaining counsel put them at a disadvantage. Only Athlete # 2's perception of the fairness of the process was, in fact, negatively affected by the perceived lack of access to arbitral information. Clearly, Athletes' perceptions of the fairness of the process are connected to the notion that the NSOs may benefit from a series of advantages relating to representation and information that are simply not available to athletes.

Acknowledgement of an adversarial environment with measurable effects on relationships. The third contextual factor is the potential negative consequences arbitration can have on both the personal and professional relationships of Athletes with their respective NSOs and other athletes in the organization. Arbitration is, by nature, an adversarial process (Lind & Tyler, 1988). In fact, SDRCC claims that this is the single greatest disadvantage of the process and claims that the process is likely to leave one party "deeply dissatisfied" (SDRCC, Arbitration, n.d., ¶ 3). However, such results may not be due solely to the outcome of the hearing.

Athletes experienced the effect of the arbitral process in both personal and professional relationships, which in turn, influenced how they viewed the fairness of the process. Each Athlete cited instances wherein the process soured one or more relationships with fellow athletes or with administrators of the NSO. The data show the strain on relationships can begin prior to the beginning of the arbitral hearing and can continue indefinitely. Athlete # 1 indicates that the strain the process put on his relationship with his NSO and Affected Parties was felt as early as the preliminary conference call to the arbitration. Athlete # 1 said:

And then we had a conference call just over procedure, which was pretty tenuous for everybody because I had a lawyer and they [the Affected Party] had a lawyer. The federation [i.e., NSO] was there...And at the end of the day, the call was very long and, ah, I don't know, I just wonder if it wouldn't of been faster if we just wrote down our arguments and the arbitrator just, you know, tries to do good with it rather than have full on confrontation, and our federation [NSO], in particular, was extremely emotional with that...

The notion of aborting the in-person or telephone conference call hearing format is an interesting one; however, it is difficult to predict the effect that such a change in proceeding would have on the Athlete's overall perception of the fairness of the process. Although it is safe to say that a shift to a document review hearing would be an effective tactic to avoid face-to-face, or voice-to-voice "confrontation" between disputing parties, such a tactic would also cause athletes to forego one of the strongest antecedents of procedural justice, that of voice. Having an opportunity to voice one's opinion to a decision-maker is regarded to have a profound effect on peoples' perceptions of fairness in the procedural justice literature (Howeison, 2002). In addition, the circumstance of a dispute may not lend itself to a documentary review format. Such a format is only possible if the execution of the process adequately satisfies the rules of procedural fairness (Corbett et al., 2008) and it is typically used only where the dispute is of a technical nature. Nonetheless, Athlete # 1's consideration of forgoing the telephone hearing process in favour of a document review process is reflective of just how confrontational the process may become. The mere fact that the Athlete is considering

alternatives to avoid further “confrontation” with his NSO and Affected Parties is perhaps indicative of the value he places on these relationships.

Athlete # 1 also acknowledged that those feelings of “tension” and “emotion” were further amplified during the arbitral hearing. He stated:

I had a witness and my federation [NSO] got extremely emotional because it was a former employee of the federation [NSO]. And that got a little bit...uh, anyway... You know, uhh, you know, uhhh, I could feel it, you know that they [the NSO] were extremely angry that this person would witness for me. Because, for various reasons, but at the end of the day by all means, I wasn't expecting everybody to be super happy with that but, yea, you could tell (little laugh) that it was emotional, yea.

Athlete # 2's perception of the hearing phase of the arbitral process is similar to that of Athlete # 1. In a defeated tone, Athlete # 2 said:

Yea, I mean it is just there is a bit of a sinking feeling in that if you're going up against your organization, win or lose, you lose because, if you win, you piss off the, the admin that are going to be in charge of the next decision um, or the upper ups. And everybody is complaining about it costing it money and there is a bunch of things going on that way. It's a.... there is very much a feeling of lose, lose. Even if I win the carding agreement, there is just going to be another fight down the road. And that may be just me because um, I have never gotten along with my organization for whatever reason. [emphasis added to reflect emphasis in interview]

Although the ‘lose-lose’ outcome described by Athlete # 2 seems to be shared by other Athletes, the intensity of his comment must be considered in the context that, by his own admission, he did not “get along with [his] organization” prior to the arbitral process. It is important to note that there is always a chance that the previous internal hearing process of the NSO may have damaged the relationships between the aggrieved athlete, and his peers and the NSO. If this is the case, the adversarial nature of the arbitral process actually amplifies such tensions and does not extinguish them. The nature of the data collected makes it difficult to attribute the strain on personal and professional relationships solely to the SDRCC arbitral process. Indeed, such a presumption seems unlikely given the preceding appeal process, which can also be adversarial in nature, pitting the athlete against the organization (and affected parties).

Athlete # 3 and # 4 also cite similar examples wherein the arbitration process has an impact on their relationship with their NSOs. During the pre-arbitration Resolution Facilitation process, a mandatory mediation-like process aimed at trying to facilitate a settlement prior to the arbitral hearing (Article 4, *Code*), Athlete # 3 indicated that the lack of structure in the process made him feel as though he was being personally attacked by his NSO. When asked specifically about the mandatory Resolution Facilitation process, Athlete # 3 said:

So we tried to do one of those [Resolution Facilitations] and I mean it was ok. I had enough after a while because, basically it was an hour of the NSO just bashing me... And I told the facilitator that all these things they are saying are not true, they don't have any facts on all these things, so I just said I am going to end

this conversation. And I hung up and sent an email to the SDRCC saying that it was just like 2 hrs of bashing me so I said it was enough of that.

Athlete # 3 also indicated that the NSO attempted a similar attack on his character during the arbitral hearing. He stated, however, he felt less affected by the NSOs comments during the hearing process when the arbitrator stated that, if the comments of the NSO could not be supported by evidence, they would not be viewed as relevant to the proceedings. By doing so, the Arbitrator conveyed to the Parties that there was indeed going to be some structure in terms of what he would consider to be testimony supported by evidence.

Athlete # 4 indicated his personal relationship with some of his fellow athletes was negatively affected by his decision to appeal the NSO decision to the SDRCC. He claimed that some athletes simply could not understand his rationale for the appeal. In a disappointed tone, Athlete # 4 said:

I can tell you one person that I am not good friends with, um, made it clear earlier, even prior to the hearing, that they don't really um, (pause), they were basically questioning me going through the whole process as a way of resolving the issue. It is kind of a hockey guy attitude of duking it out right there right and then as opposed to dragging everyone through some arbitration process of some sort. It is more of a difference of opinion between the two guys and in one of the written statements it was pretty obvious that there was a lack of respect for my decision to go to arbitration.

From the Athletes' comments the effect of the adversarial nature of the process on relationships is evident. However, the most compelling effect of the adversarial impact

comes from the fact that, for two Athletes, their arbitrations marked terminal points in their athletic careers. Although these two Athletes were in what may be considered the twilight of their careers, they felt that their relationships were so damaged that they could not continue competing in their respective sports. One of the Athletes interviewed said:

I remember in [an arbitration] which was just prior to [a major games] you know, all three of us [athlete participants in the arbitration] weren't able to train for three days and you know, in my case too, I know carding isn't a priority, but in that situation it was a career decider for me pretty much so, yeah, it is a lot of stress. That is what I would say - very stressful.

For another, although he did not actually retire from competition, he felt that his relationship was so affected by the process that he needed to take time off from competing with his National Team. This Athlete claimed:

I have been kind of blackballed by the new program...and like all of a sudden I wasn't selected for anything type thing.

In summary, the data indicates that the adversarial nature of the process has a profound influence on Athletes' relationships with peers and administrators of their NSOs. Nonetheless, the data does not explicitly reveal a connection with their perceptions of the fairness of the process. It seems unlikely, that the potential for spoiled relationships will not, on its own, dictate an athlete's over all perception of the process.

Perceived desire to be heard throughout the process. The final theme to emerge from the data is referred to throughout the procedural justice literature as "voice" (Folger, 1977, p. 108). Theories of voice suggest that an opportunity to present one's case to an impartial decision-maker, such as an arbitrator, positively influences an individual's

perception of the fairness of the process (Lind & Tyler, 1988). From the instrumentalist perspective, theories of voice suggest the opportunity to present one's case instills a sense of indirect control over the outcome of the allocation process, which, in turn, positively influences one's perception of fairness. From the non-instrumentalist perspective, theories of voice suggest that the action of arguing one's case to a decision-maker provides the speaker with a cathartic experience that may positively influence his perception of the fairness of an allocation process (Howeison, 2002), irrespective of one's ability to control, or influence, the outcome.

The data from the current study indicates voice is fundamental to Athletes # 1, 2, and 3's perceptions of the fairness of the process and is very closely connected to both the theoretical antecedents and contextual factors previously discussed.

For Athlete # 1, voice is closely related to his perception that the process may have been tainted by some elements of bias on the part of the decision-maker. This perceived lack of voice is demonstrated by his experience with an arbitrator he feels was "too close" to his NSO during the arbitral hearing and thus is not receptive to his perspective. Athlete # 1 said:

He [the arbitrator] asked them [the sport federation] one word. He said "was it like this before?" And the Federation said "yes". And I tried to get a word in to say that wasn't a fact that was definitely not a fact. Maybe it wasn't the fact that it was changing the decision, but the way that he kind of nodded, and he integrated that straight away into the report. That kind of made me a little bit, you know, in a way I kind of felt like the Federation was already part of the arbitration in the way that he was asking them if it was like that before in a way.

By conveying to Athlete # 1 that he was willing to take the NSO at its word, the arbitrator created a situation where the Athlete was left with the impression his 'voice' was not given the same consideration in comparison to that of his NSO. The repeat player effect suggests that this may be so because the arbitrator is more familiar with the NSO through multiple arbitrations.

Athlete # 2 also recalled having been through a similar situation with an arbitrator. Athlete # 2's perception of being denied a fair opportunity to voice his arguments stems from the fact that the arbitrator may have been more preoccupied with the efficiency of the process than the Athlete. Athlete # 2 recounted:

Not necessarily fair, but that the arbitrator didn't really care one way or the other to get to the bottom of it. It was like... [He] for sure was a "let's get this over kind of a feeling" And again, I don't think he was listening, especially you know... I am pretty confident that I explained the difference between a personal record and a ... and so on, but I just don't think people listened very well.

Athlete # 2's concern raises an important point. It does not suffice to simply afford an individual an opportunity to voice his case. For voice to positively influence an Athlete's perception of fairness, the arbitrator must convey that he or she is actively considering the merits of the athlete's arguments. One important way of doing this is by articulating to them how such views feed into the final decision. This sort of engagement becomes difficult if an athlete does not recognize what information is pertinent to arbitrator and the athlete may, in fact, misinterpret an arbitrator's disinterest. Although it is an arbitrator's job to keep the hearing focused on the matters in issue, the data shows that Athletes and arbitrators have differencing views about what is and is not an issue. Arbitrators are left

to strike a tricky balance between recognizing the effect of voice and staying focused on the matters in issue.

Athlete # 3, on the other hand, feels the arbitrator did hear him throughout the hearing. He engaged the services of the *Sport Solution* early in the arbitral process and was clear that his primary motivation for engaging its services was to ensure the arbitrator heard his case. Athlete # 3 said:

Umm, they...the Sport Solution helped me, um, um, present my appeal where it would actually be heard and not just thrown out or something. Um, he helped me, well the *Sport Solution* helped me understand the policy from our NSO.

Here, Athlete # 3 shows the connection between voice and two other procedural justice factors: access to representation and accuracy of information. First, Athlete # 3 indicates how engaging the services of the *Sport Solution* narrowed the informational gap that exists between athletes and arbitrators. The *Sport Solution* was able to prepare the Athlete prior to the hearing process and provide him with the necessary tools to make an impact at the hearing. Second, Athlete # 3 indicates that this narrowing of the informational gap provided him with an opportunity to present his case to the arbitrator in a way in which he would be heard, and considered, by the arbitrator.

In summary, voice was closely connected to bias suppression for Athlete # 1 and with the efficiency of process for Athlete # 2. Athlete # 3 demonstrates the close relationship between access to representation, accuracy of information, and voice. Voice, it seems, underlines Athletes #s 1, 2, and 3's perceptions of fairness but in subtlety different ways.

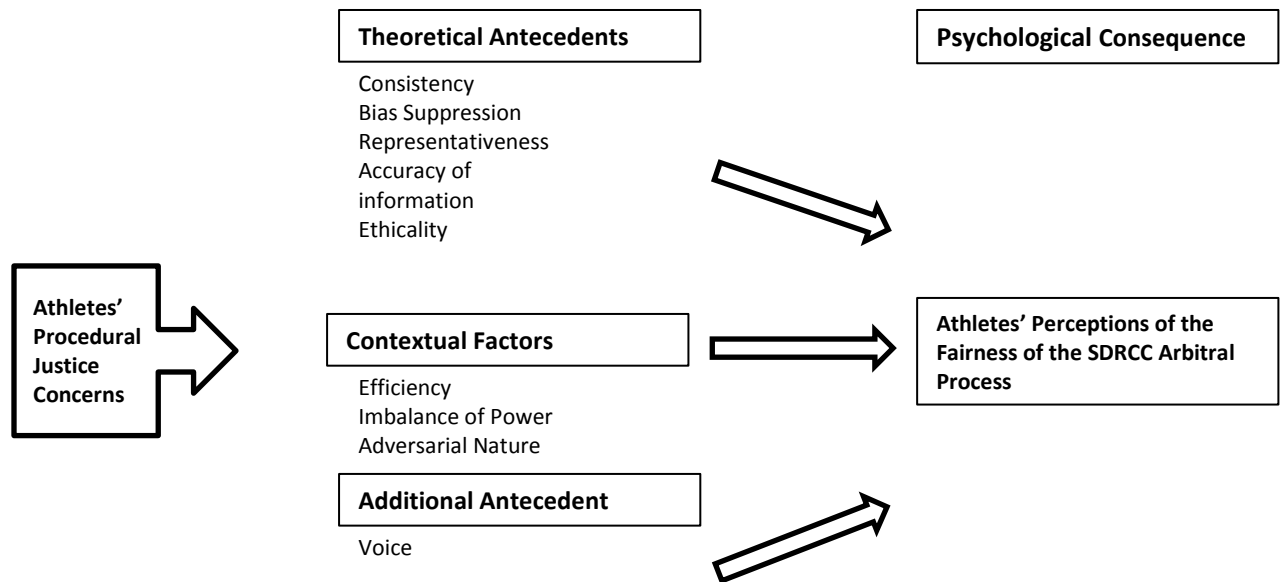
The next section represents the incorporation of the findings of Part one into a graphic representation that might be useful to future studies aimed at predicting or explaining athletes' perceptions of the fairness of the SDRCC arbitration process.

RQ2 How do Athletes' Perceptions of Fairness Reconcile with Leventhal's (1980) theory of Procedural Justice?

Leventhal's model was used as a way to examine the Athletes' experiences with the SDRCC sport-specific arbitral process in the procedural justice dimension. It provided structure and rationale to the first part of the data analysis phase. However, the application of Leventhal's procedural justice judgment model accounted for only a portion of the factors that influenced the Athletes' perceptions of the fairness of the process. The data suggest that the Athletes' perceptions are also affected by three contextual factors unique to the process and an additional antecedent of procedural justice. Emergent themes revealed that efficiency, imbalance of power, relationships, and voice also have a significant influence on the Athletes' perceptions of the fairness of the process. Although further empirical study is required to truly adapt a comprehensive model of procedural justice that fully explains Canadian athletes' perceptions of the fairness of the SDRCC sport-specific arbitral process, Figure 4.1 describes a combination of Leventhal's antecedents of procedural justice and contextual factors emerging from the data that had an influence, or potential influence, on the Athletes' perceptions of fairness of the SDRCC's arbitration process.

Figure 4.1

Depiction of the theoretical antecedents and emergent conditions influencing the Athletes' perceptions of fairness of the SDRCC's arbitration process



**The correctability antecedent is omitted as the nature of the SDRCC arbitral process makes the antecedent irrelevant to this particular context.*

This depiction of the antecedents and the contextual factors that emerged from the data demonstrates just how complex and nuanced the Athletes' perceptions of the fairness of the SDRCC arbitral process truly can be. As can be seen in Figure 4.1, the Athletes' perceptions of the fairness of the SDRCC arbitral process are influenced by five of Leventhal's antecedents of procedural justice, the contextual factors unique to the arbitral process, and by the additional antecedent of voice. In essence, the data show that the Athletes' relied on a combination of psychological antecedents and contextual factors in establishing their individual perception of the fairness of the SDRCC arbitral process. Most importantly, the data revealed that Leventhal's antecedents of procedural justice are only capable of accounting for a portion of the Athletes' perceptions of the fairness of the

process. The data clearly show that the unique features of a process of allocation (i.e., contextual factors) play a critical role in an individual's final appraisal of fairness of a process. In the end, applying Leventhal's model of procedural justice judgment without considering and interpreting the data that emerged from the Athletes' interviews would have produced incomplete accounts of the Athletes' perceptions of the fairness of the process.

Summary of data analysis

In conclusion, it is evident from the two-stage data analysis process that the application of Leventhal's (1980) procedural justice judgment model is helpful in identifying the antecedents that affect the Athletes' perceptions of the fairness of the SDRCC arbitral process. The Athletes viewed and embraced these antecedents differently. Each gave different weight to the various antecedents depending on their individual circumstances. Accounting for such differences within the application of Leventhal's model allowed, to some extent, the capture of the individual and unique experiences of the Athletes interviewed. However, the application was not perfect. This created a need to further explore the Athletes' perceptions of the fairness of the process and the nature of the process itself. A combination of the theoretical antecedents with the emergent data related to the procedural justice dimension proved to be an effective approach for the initial identification and explanation of the Athletes' perceptions of the fairness of the process.

The following section uses the Athletes' experiences to comment on the relationship that exists between perceived fairness (i.e., procedural justice) and legal fairness (i.e., procedural fairness).

RQ3 What Can Athletes' Experiences in the SDRCC Arbitral Process Tell us About Procedural Fairness?

This section uses the Athletes' experiences with the SDRCC arbitral process to comment on the procedures that are fundamental to the objective fairness of the SDRCC arbitral process and their connection to the Athletes' perceptions of the fairness of the process. As Lind & Tyler (1988) and Bingham (2004) indicate, a person's perception of the fairness of a process is affected by both subjective psychological and objective legal components of the process. Examining the close relationship between the two provides a first attempt at establishing a reciprocal relationship between the two.

This examination will focus on the close relationship that exists between the tenants of legal, or procedural, fairness and the procedural justice antecedents and contextual factors that have been found to influence the Athletes' perceptions of the fairness of the SDRCC arbitral process. Specifically, the three absolute tenants of procedural fairness will be discussed through: the nature of the SDRCC disclosure process (Article 3, *Code*), the manner in which SDRCC arbitrators are appointed (Article 3.2, *Code*) and selected (Article 6.8, *Code*), and the SDRCC procedures of the panel during the arbitral hearing (Article 6.16, *Code*). These rules were selected as they reflect the three absolute tenants of legal fairness.

Disclosure of the case to be met.

Disclosure of the case to be met is required by the rules of procedural fairness (Blake, 1992; Corbett et al., 2008; Jones & de Villars, 1985) and is meant to ensure that disputing parties are adequately informed of the necessary details of their case, so they may carefully respond. Rules relating to disclosure are found in Article 3 of the *Code*,

which sets out what has to happen in terms of submitting a claim to be arbitrated and the timeline required to hear such a claim. Although such pre-arbitration rules are directed at protecting the disputing parties' right to full disclosure of the case to be met, the data reveals that the Athletes believe they require more, or perhaps a different kind of information in addition to the disclosure information, to perceive the process to have treated them fairly. The Athletes' experiences indicate that perceptions of fairness are influenced by both knowing the case and knowing the arbitral process.

The subjective component of the fairness construct reveals that in-depth arbitral information is required in conjunction with the appropriate disclosure documentation for this process to not only be fair, but to be viewed as fair by the Athletes. Although two of the four Athletes interviewed claimed to be satisfied with information regarding the arbitral process that was provided to them by the SDRCC and the *Sport Solution*, Athlete # 2 raised a general concern about the lack of an institutionalized method for delivering, in general, arbitral process information to athletes prior to the initiation of the arbitral process. There exists an imbalance between athletes and NSOs related to an information deficit in the current arbitral process. The data reveals that detailed information about the nature of the arbitral process and a guide to work through the process is necessary in addition to disclosure information for the Athletes, in particular Athlete # 2, to view the process as being fair. Athlete # 2 indicated that athletes are in need of a "tool box" that informs them how to fill out SDRCC forms, what constitutes grounds for an appeal - and what this means, and the difference between evidence and testimony. The data indicates that the provision of such informational materials, at least in Athlete # 2's case, by SDRCC or perhaps by other organizations within the Canadian sport system, in

conjunction with the appropriate disclosure information, would increase the likelihood that the Athlete would view the process as having treated him fairly, at least on this dimension.

Rule against bias, and the selection and appointment of SDRCC arbitrators (Article 6.8, *Code*).

The selection of an arbitrator is an important feature of any arbitral process. In a mandatory arbitral process, such as the SDRCC process, the process to select an arbitrator provides disputing parties with an opportunity to exercise some degree of control over the selection process and, according to some Athletes, some advantage in the process. The following section illustrates how the current appointment process of SDRCC arbitrators operates.

Pursuant to the Article 6.8 (b) (i) and (ii) of the *Code*, parties are provided an opportunity to select an adjudicator to hear their dispute. In the event parties cannot agree, or if neither party puts forward a name, the SDRCC will select an arbitrator, on a rotational basis from a roster, to hear the matter (Article 6.8 (b) (1), *Code*). Despite the fact that Article 6.8 provides parties some autonomy over the selection process, SDRCC actually maintains absolute control over who they appoint to their roster of arbitrators. In effect, SDRCC maintains a great deal of control over who the Parties may select and how the Parties may select their arbitrators. As manager of its arbitral process, the SDRCC will “establish and maintain lists of Mediators, Arbitrators, and Med/Arb Neutrals” from which both Applicants and Respondents may select (Article 3.2, *Code*). The names and *curriculum vitae* of SDRCC arbitrators are published online for the convenience of SDRCC users. Using this information in conjunction with an opportunity to review past

arbitral decisions, Parties are afforded the opportunity to select an arbitrator to hear their dispute.

The practice of maintaining a limited list of arbitrators ensures an efficient process of selecting arbitrators. However, there is little, if any, information as to the process for appointing arbitrators to the roster. There is no information about how long they may remain appointed arbitrators, and what role they may continue to maintain within the general sport system. Athlete # 2 commented on the role arbitrators' play in the wider sport system during his interview. Athlete # 2 said:

Halfway through the arbitration he travelled to lecture to the WADA at a plenary in Lausanne. So halfway through my arbitration [on a doping matter] we adjourned and the adjudicator, um, and the counsel for the [Respondent] and one of the key witnesses from the lab [name omitted] all travelled to Lausanne being paid for by WADA to lecture to prosecutors who were all also flown in by WADA. [The adjudicators] title address (laugh) was "how to more effectively prosecute anti-doping offences". So the prosecutor [Respondent in this case] went and listened to the adjudicator to learn how to be more efficient in prosecuting you know, amongst others, my doping offence. So they, it is like it is such a tight little circle, especially when, not necessarily in the Ordinary [Division of SDRCC] but in the Doping [Division of SDRCC], but it is very tight-knit.

The situation described by Athlete # 2 is an example of the challenge the SDRCC is faced with in terms of suppressing bias, or perceived bias, from both the procedural fairness and procedural justice perspectives. As previously suggested, Athlete # 2's perception of the fairness of the process was likely negatively affected by the situation

described as part of his doping arbitration. The Athlete's experience also suggests that clearly defined rules stating what roles arbitrators may continue to play in the wider sport system may be necessary to also ensure the legal fairness of the process. Such rules would aim to prevent SDRCC arbitrators from participating in activities within the wider sport system that may create an actual or reasonable apprehension of bias while simultaneously promoting perceptions of the fairness of the process in the eyes of athletes. Athlete # 2's experience helps to articulate the profound connection between the subjective and objective components of fairness in the context of suppressing bias, or perceived bias.

Right to a hearing and procedures of the panel.

The final procedural rule of the SDRCC arbitral process to be commented on is Article 6.16 of the *Code*, which confers discretion to arbitrators to conduct SDRCC arbitral hearings. Provision (a) of this Article confers the entire procedural design of the arbitration hearing to the arbitrator, provided "...Parties are treated equally and fairly and given a reasonable opportunity to present their case or respond to the case of another Party as provided by [the] *Code* and applicable law" (Article 6.16 (a), *Code*). Such discretion is considered necessary to "avoid delay and achieve a just, speedy and cost-effective resolution of the dispute" (Article 6.16 (a), *Code*). There is one particular Athlete accounts that speaks to this provision and the influence arbitrator discretion had on his right to procedural fairness and his perceptions of the fairness of the process.

Athlete # 1 first raises the issue when discussing the use of a witness in one of his disputes. He recalls having used witness testimony to help articulate his position with regard to amendments allegedly made by the NSO to a selection policy. Athlete #1 said:

He testified like, obviously, 100% on my side, although I shouldn't say that in that regard because that is not how you would say it in law, but he did witness in a confirming way, the way I interpreted the text. And the arbitrator pretty much dismissed all his claims and uh, I was a bit surprised with that for sure.

Athlete # 1 does not believe the arbitrator gave oral reasons for not considering the witness testimony during the arbitral hearings. As well, to the Athlete's surprise, the Arbitrator's written decision did not contain any references to his witness's testimony during the hearing. Athlete # 1 said:

Well that is the thing you know? You listen to him and... You know, I, I, that is a pretty big frustration on my behalf because at least he mentioned... you know... If he would have mentioned that the guy wasn't credible for any sort of reason I would have said well, I wouldn't have agreed but you know, like that would have been a point. But he never like mentioned it.

The arbitrator's failure to acknowledge testimony of Athlete # 1's witness during the arbitral hearing, or in his written decision, has an obvious impact on the Athlete's perception of the fairness of the process. Failure of the arbitrator to communicate reasons for considering, or not considering, the witness's testimony left Athlete # 1 unable to understand what was considered by the arbitrator and how it fed into his decision. As the laws of procedural fairness are flexible, SDRCC arbitrators are not bound to follow strict rules for presenting evidence, or for presenting and calling witnesses. Certainly, at the very least, the arbitrator should acknowledge the testimony of the witness in both the hearing and the written decision.

As the SDRCC exists to review NSO decisions for fairness the data, indicates that the SDRCC also necessarily plays a role in the determination of Athletes' perceptions of the fairness of the SDRCC arbitral process. Although the identified SDRCC procedural rules are designed to meet standards of fairness imposed by law, the operation of such rules also influences the Athletes' perceptions of the fairness of the process.

In sum, the procedural justice antecedents and contextual factors discussed in Part 1 (a) and (b) of the present Chapter, along with the apparent relationship that exists between the Athletes' perceptions of fairness and the legal fairness of the process, provides rational evidence to consider both the subjective psychological antecedents and objective legal tenants of fairness in an analysis of the overall fairness of the SDRCC arbitral process. Such considerations would increase the likelihood of maintaining a process that is both legally fair and perceived as being fair by its users.

Chapter 5

Conclusion

Conclusions Drawn From Major Findings

The following paragraphs discuss conclusions that are drawn from an analysis of the Athletes' perceptions of the fairness of the SDRCC arbitral process. The three Research Questions are used as a framework for presenting these conclusions.

RQ1 What are Athletes' perceptions of the fairness of the SDRCC arbitral process?

In order to answer the first Research Question, Athletes were asked to define what fairness in decision-making meant to them and to explain, in detail, their arbitral experience. Each Athlete's interview text revealed a slightly different view of the fairness of the process. Athlete # 1 had mixed feelings finding certain aspects of the process to be unfair for him. Athlete # 2 was more convinced the process was unfair from an athlete's point of view. Athlete # 3 held the most positive view of the process and believed that, at least in his case, the process was implemented in a relatively fair manner. Finally, Athlete # 4 maintained a relatively neutral perception of the fairness of the process, which may stem from an indifference to certain key aspects of the process. The interviews revealed a great deal about each Athlete's experience with the process, but did not reveal any overwhelming, or overt, expressions of fairness. Leventhal's (1980) model of procedural justice judgments was used as a tool to 'unpack' and investigate Athletes' complex and nuanced perceptions of the fairness of the process.

Leventhal's antecedents provided an opportunity to illuminate the elements of the process that had the greatest influence on the Athletes' perceptions of the fairness of the

process. Four of Leventhal's six antecedents were found to have the strongest influence: consistency, bias suppression, accuracy of information, and representativeness.

Conclusions drawn from each of these antecedents are presented below.

Consistency. In terms of the consistency antecedent, Athletes' perceptions of the fairness of the process are influenced by how they are treated by SDRCC administrators and arbitrators in comparison to their NSOs. As this antecedent requires an individual to make a comparison to another individual, or experience with the same procedure (as was the case for Athletes # 1 and 2), it can be concluded that the weight Athletes' may attach to this antecedent will increase with the frequency with which they engage the process.

The flexible nature of the arbitral process likely amplifies this perspective, particularly as it may affect a repeat player. Since the NSO is more likely to be the repeat player, it would not be surprising for athletes to view the NSO as receiving preferential treatment. As well, the form of SDRCC arbitration depends on a number of factors such as: the nature of the dispute, time constraints imposed on potential resolution, the participation of affected parties, and the location of parties, among others. As it did for Athlete # 1, the flexible application of the same arbitral procedures in conjunction with the NSO benefiting from a "repeat player effect" (Bingham, 1997) can create an environment wherein an infrequent user of the process (i.e., an Athlete) will misconstrue flexibility, which can be a positive factor in the process, for inconsistency.

Bias Suppression. The bias suppression antecedent was also found to be an important influence on Athletes' perceptions of the fairness of the process. Although not all Athletes' cited instances where they felt their disputes were tainted by bias, all Athletes' recognized the importance of limiting bias throughout the process. There are

two distinct conclusions that were drawn from the application of this antecedent to Athletes' interview texts. First, feelings of being a party to a biased arbitral process likely derive from the "repeat player effect" (Bingham, 1997). This was evident in both Athlete # 1's and 2's interview texts. Each Athlete cited instances where they believed their NSOs had greater familiarity and facility with the process, which, in turn, created an environment in which arbitrators were seen to favour NSO testimonies over those of Athletes (although, in reality, this may not necessarily have been so). Second, the narrow scope of review adopted by arbitrators adjudicating the disputes of Athletes # 1 and 2 caused them to feel that the arbitrators were more interested in protecting the autonomy of the NSO than in hearing their appeals. Each Athlete felt the narrow scope of review adopted by the arbitrators prevented the arbitrators from considering important sport-specific details of their cases. The use of such a narrow scope of review left these Athletes feeling as though the process was biased in favour of the NSOs.

Accuracy of information. Accuracy and completeness of the information that was used by the arbitrators to adjudicate the Athletes' disputes also played an important role in the determination of the fairness of the process. In the same way that arbitrators' narrow scope of review caused Athlete # 1 and 2 to feel as though the process was influenced by bias, a narrow scope of review also caused these two Athletes in particular, to feel as though arbitrator decisions were based on incomplete and inaccurate information. It is concluded that the root of such perceptions relate to the technical, or legalistic, nature of the process. Simply put, the better an Athlete can understand what type of information required by an arbitrator to make a decision, the more likely it is that an Athlete will understand how the evidence (or information) put forward fed into the

arbitrator's decision. Although it is important for an arbitrator to be able to communicate to both parties what information is relevant in arguing the matter in dispute, the obligation to provide the arbitrator with appropriate evidence falls on the athlete. The arbitrator makes a decision based only on the evidence provided. It seems that the Athletes did not have sufficient knowledge or skill to fully understand the increasingly legalistic process. However, an athlete may develop a greater understanding of the process, and facility with it, by retaining legal representation, engaging the services of the *Sport Solution*, consulting the educational materials on the SDRCC website, and through the athlete's NSO Athlete Rep who is to be informed about the SDRCC arbitral process.

Representativeness. The representativeness antecedent also showed prominently in Athletes' determinations of the fairness of the process. Athletes revealed that the degree to which an arbitrator is perceived to be representative of, or in some ways sympathetic to, the athlete sub-group, contributes to their determinations of the fairness of the process. Athlete # 3 provided a clear example of the power of this antecedent. The right to select an arbitrator (Article 6.8, *Code*), gives athletes some autonomy over the process by affording them an opportunity to select an arbitrator whom they feel is most likely representative of their concerns and values. Athlete # 3's view of the fairness of the process was directly linked to his ability to make an informed arbitrator selection. With the help of *Sport Solution*, this Athlete invested time learning arbitrators' professional backgrounds and, more importantly, invested time reviewing arbitrators' decision-making histories.

The data also showed that a perceived lack of representativeness in arbitrators will have a strong negative influence on Athletes' perceptions of the fairness of the process.

Athlete # 1 and 2 claimed to have dealt with arbitrators who were not representative of their concerns or values and this had a negative influence over their perceptions of the fairness of the process. For these two Athletes, the arbitrators' lack of sport-specific knowledge made it difficult, if not impossible, for them to feel any benefit from the representativeness antecedent. The impact of the perceived lack of sport-specific knowledge demonstrated by the arbitrators that adjudicated their disputes brings into question the SDRCC criteria for appointing arbitrators (Article 3.2, *Code*). While the Article calls for arbitrators to "...possess recognized competence with regard to sport..." SDRCC does not define what it means by "competence with regard to sport" (Article 3.2 a (i), *Code*). Clearly defined criteria are required to determine what it is that makes an SDRCC an expert in sport. Does their expertise come from a history of competing in the sport system? Does it come from a history of working within the sport system? If so, were they working on behalf of athletes or on behalf of NSOs? Additionally, does sport-specific expertise take precedence over other characteristics such as sex, age, or ethnicity? These important questions need to be answered to properly establish criteria for determining an arbitrator's sport-specific expertise.

RQ2 How do Athletes' perceptions reconcile with Leventhal's (1980) theory of procedural justice?

Leventhal's antecedents alone could not completely account for how fair an Athlete perceived the process to have been. The data also revealed three contextual factors, and an additional antecedent, which contributed to Athletes' perceptions of the fairness of the process. Efficiency of the process, a perceived power imbalance between Athletes and NSOs, and the adversarial nature of the arbitral process are unique

environmental conditions that influenced Athletes' perceptions of the fairness of the SDRCC arbitral process. The opportunity for Athletes to voice their side of the 'story' was also found to influence Athletes' perceptions of the fairness of the process. Although they are not explicit components of Leventhal's model of procedural justice judgments, the extent of their influence on the perceptions of the fairness of the process was profound. It is unknown whether the contextual factors work as virtual antecedents or whether they should be viewed as sway factors that contribute to Athletes' appraisals of the fairness of the process. The following paragraphs explore the conclusions drawn from each contextual factors.

Efficiency of process. Kaufman-Kohler (2003) argues that efficiency of process is a universal principle of all forms of arbitration. This means that the flexible nature of the arbitral process can produce efficient results when the circumstances call for it. In sport, those circumstances are created by timelines imposed by the completion schedule (Kaufman-Kohler, 2001). The data showed that Athletes' hold different views of the efficiency of SDRCC sport-specific arbitral process. For example, Athlete # 4 acknowledged that efficiency of process was one of his primary motivations for engaging the process. Athlete # 2, on the other hand, recognized that, although efficiency is valuable, an overemphasis on the principle can make the process move too quickly, especially for an unrepresented athlete. What is interesting, however, is how the Athletes' views of efficiency of process relate to their views of Leventhal's antecedents. Athlete # 4, who put a premium on efficiency, was far less concerned with the accuracy of information (one of Levanthal's antecedents) than Athlete # 2, who was less concerned about the efficiency of the process. This is not surprising, as efficiency comes at the

expense of something else. Athlete # 2 felt that efficiency of process was coming at the expense of complete and accurate information (one of Leventhal's antecedents). The data also showed that efficiency, which will vary from one dispute to another, can be problematic for those Athletes going up against an NSO with greater familiarity and facility with the process (i.e., a repeat player). Athlete # 1's perception of the fairness of the process was greatly influenced by the distinct differences in time it took to arbitrate both his disputes. With greater familiarity and facility with the process, Athlete # 1 would have been able to recognize why his first selection dispute moved at a considerably faster rate than his second carding dispute.

Perceived power imbalance. The data indicated that Athletes were influenced by a perceived power imbalance between Athletes and NSOs. One effect of this imbalance relates to the Athletes' resource-based concerns regarding representation and pre-arbitration information about the process. A barrier to accessing legal representation was the strongest manifestation of this imbalance of power. Athletes' inability to afford legal representation caused them to feel unfairly disadvantaged in the process in comparison with their NSO. Although sport-specific arbitration is championed because it is less costly than litigation, the data reveals that the cost of even arbitrating sport-related disputes is still seen to be a problem for Athletes. It is important to note that the Canadian sport system offers a great deal of support to athletes who cannot afford to pay for legal representation. Athletes CAN provides athletes facing a dispute an opportunity to be advised by law students through the *Sport Solution* and, more recently, SDRCC has begun to provide *pro bono* representation services to athletes (however, this came about after this study was undertaken and thus the effect of this initiative is not known).

A second consequence of this imbalance in power between the Athlete and NSO is seen in the Athletes' purported access to pre-arbitration information about the process. Athlete # 2 in particular, perceived the lack of a universal method of delivering information about the arbitral process to athletes as contributing to a perceived imbalance of power. Although the data suggests that there may be a real information deficit to Athletes, there are informational resources available to athletes through various institutions in the sport system. For example, SDRCC offers information regarding its process through its website, Athletes CAN educates Athlete Representatives to provide athletes with arbitral information, and the *Sport Solution* exists for the purpose of providing athletes information on the SDRCC, including information on the arbitration process itself. It may be extrapolated from the data that Athletes must not only be given access to complete arbitral information, but they must also be able to process and understand this information. As is the case with the issue of legal representation, the sport system offers athletes various opportunities to become informed about the process. Clearly, athletes need to avail themselves of the information and resources available to them. The bigger question is they do not? Although it is not clear from the data, Athletes' who best understand the process and the rules that govern the arbitral process should be the most likely to be of the view that the process was fair.

Adversarial nature of the process. Arbitration is by nature an adversarial process that pits one party against another party and can leave the losing party "deeply unsatisfied" (SDRCC, n.d., ¶ 3). The Athletes' interviews suggest that the negative influence the process has on their personal and professional relationships is also a contributing factor to their perceived satisfaction and perceived fairness of the process, in

addition to the received outcome. Athlete #1 exhibited a great deal of guilt when he discussed the effect of the process on his personal and professional relationships. Specifically, the Athlete felt guilty for delaying carding payments to Affected Parties who could not receive their training money until the end of the arbitral process. Athlete # 4 cited a deterioration in the professional relationships with his NSO and in relationships with his fellow athletes. In another instance, the animosity that existed between one of the Athletes and his NSO, which was amplified during the arbitral proceedings, discouraged the Athlete from continuing to compete with his National Team despite the outcome he received in arbitration. Softening the impact of the process on personal and professional relationships may simply fall outside the reach of SDRCC since most NSOs and Athletes who engage the arbitral process are already in the midst of a seemingly intractable difference which has led to the arbitration in the first place. It may be that it is simply an unfortunate reality of the process.

Voice. In addition to the contextual factors, previously discussed, the investigation of emergent phenomena also revealed that the opportunity to voice one's case, a widely cited antecedent of procedural justice, also had a significant influence on Athletes' perception of the fairness of the process. The data showed that Athletes have a fundamental desire to be heard throughout the arbitral process and that the perceived denial of this opportunity can, and did, have a detrimental impact on their overall perceptions of fairness. Athlete # 1's and 2's perceptions were negatively influenced by the fact that they felt they were denied adequate opportunities to argue their cases to the arbitrators. For Athlete # 1, the denial of this opportunity was connected to the repeat player effect and Leventhal's bias suppression antecedent. For Athlete # 2 the denial of

this opportunity was connected to the Arbitrator's narrow scope of review and Leventhal's accuracy of information antecedent. Athlete # 3, on the other hand, felt that the process satisfied his need to be heard. The positive influence of "voice" (Folger, 1977, p. 108) in this case, was connected to Leventhal's representativeness antecedent and the fact that this Athlete maximized his opportunity to strategically select an arbitrator to hear his dispute. Athlete # 4 also believed that he was given an adequate opportunity to be heard in the process. His sense of being heard was connected to his view of efficiency and Leventhal's accuracy of information antecedent.

This phenomenon of voice is so strong that it seems to undergird the antecedents and environmental conditions that were found to influence the Athletes' perceptions of the fairness of the process. Although there is no data to suggest that Athletes' concerns for voice are more instrumental than they non-instrumental, their general concern is consistent with the procedural justice literature, which suggests voice is directly or indirectly connected to an individual's perception of the fairness of a process (Thibault & Walker, 1975). Voice, it seems, is at the crux of Athletes' perceptions of the fairness of the process.

These contextual factors and the additional antecedent highlight the unique aspects of the sport-specific arbitration process that work in conjunction with Leventhal's antecedents to form Athletes' perceptions of the fairness of the process.

RQ3 What can Athletes' experiences in arbitration tell us about procedural fairness?

The data revealed a relationship between the subjective and objective elements of fairness discussed by Lind & Tyler (1988) and Bingham (2004). There is a close

relationship between the subjective psychological elements that influence Athletes' perceptions of the fairness of the process and the procedural rules of the SDRCC arbitral process, the latter which exist to meet minimum standards of legal fairness. However, the data from this study indicates that perceived fairness does not necessarily follow legal fairness. In other words, because a process is legally, or procedurally fair, it does not necessarily follow that Athletes will perceive it to be entirely fair from a subjective perspective. For example, the data indicates that Athletes' perceptions of the fairness might be heightened in the disclosure process if they are provided with additional pre-arbitration information about the process. The data also shows that the provision of additional information concerning how SDRCC arbitrators are appointed, the length of the term of their appointment, and roles they may continue to play within sport system while appointed, is important in eliminating, or at least reducing, the appearance of bias in the appointment and selection of SDRCC arbitrators. Finally, the data reveals that giving broad discretion over the arbitral process to the arbitrator can produce an environment perceived by an athlete as being unfair despite the fact that it may be completely fair at law, and, in fact, fair to the athlete's case at that moment.

Implications for Sport-Specific Arbitration in Canada

Arbitration is the preferred method of dispute resolution at international and domestic levels of high performance sport (Anderson, 2006; Beloff et al., 1999; Blackshaw, 2002; Findlay, 2006; Findlay & Corbett, 2002; Hayes, 2004). At present, justification for compelling athletes, and NSOs, to arbitrate sport-related disputes derives from a collection of relative advantages. The main advantages have been identified as: confidentiality of proceedings; use of simplified procedures; reduced costs; finality of

proceedings; expediency and flexibility of procedures; expert decision-making; and international enforceability (see review of literature, p. 14-19). These advantages, although important from an operational perspective, say little about the perceived fairness of arbitrating sport-related disputes. Understanding the Athletes' perceptions of the fairness of the process provides an opportunity to know how members of the athlete sub-group think and feel about the process, and go beyond simply the legal efficiency and efficacy of the process. The following paragraphs consider implications for the Canadian sport-specific arbitral process through the Athletes' lived experiences with the process.

The data show that advantages such as efficiency of process, reduced costs, and expertise of decision-makers, simply do not consider how Athletes' have ultimately experienced and viewed the process. As previously discussed, overemphasis on the universal principle of efficiency (Kaufman-Kohler, 2001) can leave an Athlete feeling as though the process moved so quickly that it could not be considered fair. Although costs associated with the arbitral process may be less than those associated with litigation (Elkouri & Elkouri, 1985), it is apparent Athletes' still cannot afford the cost of retaining representation, putting them, at what they perceive to be, a disadvantage compared to their NSOs. Athletes also question the sport-specific knowledge of SDRCC adjudicators. Such views contribute to a perceived unfairness in the process and, as a result, a potential reduction in institutional legitimacy in the eyes of the Athlete. The following presents suggestions to promote feelings fairness within the athlete sub-group in regards to the Canadian sport-specific arbitration program.

To promote feelings of fairness and institutional legitimacy among the Athlete sub-group, their resource-based concerns need to be addressed. The data show that

Athletes perceive themselves to be at a disadvantage in relation to their NSOs when it comes to retaining legal representation and accessing information about the process. As it has already been argued there are considerable resources already at athletes' disposal. Perhaps a reorientation or centralization of these resources is required to address Athletes concerns. In his interview, Athlete # 2 suggested that perhaps the implementation of an independent ombudsmen office could be a means to level the perceived imbalance of power that exists between Athletes and NSOs. Such an office could supplement pre-arbitral information that is currently available to athletes. It could also monitor all athlete/NSO disputes at the internal level, or prior to being submitted for arbitration by either party; review athlete Requests and Answers to arbitration; and provide athletes with legal representation for the duration of the arbitral process²⁹. The addition of an ombudsmen's office to the Canadian sport system would centralize informational resources to an independent office and, perhaps, help to change Athletes' perceptions that they are disadvantaged in arbitral process in comparison to their NSOs.

Future Research

As this is a preliminary study into Athletes' perceptions of the fairness of the SDRCC sport-specific arbitral process, there are several opportunities to conduct future research in the area. Future studies should limit the investigation of the subjective and objective construct of fairness to one or the other. This study attempted to investigate Athletes' perceptions of the fairness of the process and explore the proposed relationship between the subjective and objective elements of fairness. Although they are both

²⁹ Now SDRCC provides athletes with *pro bono* legal representation, providing athletes with representation may no longer be a priority for this type of office.

connected in that both the psychological and legal aspects of fairness play a role in the determination of an individual's perception of the fairness of a process (Lind & Tyler, 1988), each aspect requires a different research design for thorough investigation. The following is a presentation of suggestions for future research of both the psychological and legal fairness in the context of sport-specific arbitration.

In this study, a qualitative research design with an emphasis on crystalizing individual perceptions was selected. The purpose of such a design was to capture data and present findings that could explain Athletes' perceptions of the fairness of the SDRCC arbitral process. Opting for a small, purposeful sample (Merriam, 2009), enabled Athletes' perceptions of the fairness of the process to be thoroughly investigated. To extend and test the findings presented in this study, a quantitative or mixed methods design is required. Such studies should be done with a larger and truly representative sample size, and combine a quantitative investigation of athletes perceptions of the fairness of the process with qualitative interviews. The development of such a research design could produce categorical evidence relating to athletes' perceptions of the fairness of the process and the procedural justice dimension.

The literature suggests that investigating sport-specific arbitration from a legal perspective has traditionally concentrated on answering the question "What is sports law?" Such research focuses on CAS jurisprudence and the emergence of a purported *lex sportiva* from its case law. There has been a shift in the nature of research that is being conducted. Recent trends in the study of sport-specific arbitration have shifted from a focus on the outcomes of arbitral decisions to the investigation of the process by which arbitral decisions are delivered. This shift is evident in the work of Kaufman-Kohler

(2001) who questions the influence of efficiency on fundamental principles of fairness at the international level. In the Canadian context, the SDRCC arbitral process is also being examined in a new light. Findlay and Mazzuco (2010) recently applied Erbsens (2006) legal interpretivism framework to better understand how SDRCC arbitrators arrive at their decisions. This research has provided conclusive evidence of a unified approach for limiting appeals to the SDRCC to procedural interventions and an emerging broadening of decision-making to the substantive aspects. The general shift in the sport-specific arbitration research from outcomes to processes is representative of the one called for by Hayes (2004) who said:

If anything, the sports law debate, which undoubtedly is being undertaken with the best of intellectual intentions by all participants, has overlooked a more fundamental and important issue at stake: regardless of the answer to the question “What is sports law?”, the more pressing question which should be posed is “What are sporting disputes and how are they best resolved?” (p.22)

The likelihood of implementing a sport-specific arbitral process that is both legally fair and manifestly viewed as being fair (Jones & de Villars, 1985) will improve as the complexities of the process become clearer through process centric research.

Understanding the arbitration of sport-related disputes from both the subjective and objective perspectives will no doubt contribute to the production of higher quality arbitral awards.

Conclusion

This thesis investigated the perceptions of the fairness of the SDRCC arbitral process of four Canadian high performance Athletes. Leventhal’s model of procedural

judgment and the use of emergent data allowed for a thorough investigation of the Athletes' perceptions of the fairness of the process in the procedural justice dimension. Despite the Athletes' complex and nuanced perceptions of fairness, this study yielded several important conclusions about how Athletes' think and feel about Canada's mandatory sport-specific arbitral process. Even though the process is capable of producing efficient, relatively cost effective, and legally enforceable outcomes, an investigation of the Athletes' experiences shows that the process may fall short of ensuring that the athlete sub-group will perceive the process to have treated them fairly.

Although further exploration of the antecedents and contextual factors presented by this study is required to institute any significant policy or procedural changes to the SDRCC arbitral process, a review of the SDRCC's 2011-2012 Corporate Plan suggests that the findings presented here may be of benefit to the SDRCC, at least in the short-term. In the Corporate Plan, the SDRCC outlines a list of objectives and initiatives aimed at achieving, among other things, "enhanced excellence in the Canadian sport system by strengthening the culture of fairness through education and dispute prevention initiatives and by providing world-class resolution facilitation, mediation and arbitration services to resolve sport-related disputes" (SDRCC Corporate Plan, 2011, p. 6). It is indeed important for the SDRCC to proactively prevent and reduce the number of disputes heard by its arbitration divisions, however, the data suggest that to truly establish a 'culture of fairness' and 'world-class' dispute resolution services in general, the SDRCC must endeavor to provide services that are both legally fair and viewed as being fair by its users. As a preliminary investigation of athletes' perception of the fairness of the SDRCC arbitral process, this research suggests that a failure to consider both the subjective and

objective components of the concept of fairness could cause the SDRCC to fall short of the high watermark that is outlined in their Corporate Report.

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Appendix A

Romangnano's nine step method for tidying up data

<i>Steps</i>	<i>Tidying up Procedures</i>
1	Make copies of all data
2	Put all field notes and interviews into a file in order of their dates of completion
3	Create other files based on type of data (e.g., interviews, questionnaires, field notes, artifacts), participants (e.g., data separated into files for students, teachers, staff development workers, parents), or organizations (e.g., data separated into files for health agencies, foundations, schools, labor unions, and clinics), subject or topic (e.g., data separated according to materials on recruitment of students, recruitment of teachers, parent involvement, curriculum characteristics, school board politics). The files to be created depend completely on what is reasonable and necessary, given the research questions.
4	Catalog and store all documents and artifacts.
5	Label all files and boxes according to their content.
6	Create an index or table of contents for all data.
7	Review research questions, comparing them against the data collected.
8	Identify any holes or missing data chunks by determining if data actually were collected to answer each research question.
9	Return to the field to collect additional data to fill gaps in the record. Holes in the record sometimes cannot be avoided. Data initially thought desirable may turn out to be unnecessary; or collecting it may be too difficult, expensive, or dangerous. If the latter, then researchers must develop a rationale for why missing data cannot or will not be acquired

Appendix B

Semi-Structured Interview Guide

1. What does fairness in decision-making mean to you?
 - Why do you think you define fairness in decision-making that way?
 - Have you always thought about fairness in decision-making that way?
 - In your view, what are the qualities of a fair decision?
2. I want to walk through your arbitration experience now, from the time you first filed a request for arbitration, to the time you received a written decision from the arbitrator?
 - First, let's start with the pre-hearing process.
 - o What role did you play in the filing process?
 - How did you feel about the process?
 - o What was your role in producing the disclosure documents (agreed statements of facts)?
 - How did you feel about the role you played?
 - o Describe how you felt about working with the respondent during this process.
 - Why did you feel this way?
 - o Describe how you felt about working with the SDRCC during this process.
 - Why did you feel this way?
 - o Did you play an active role in selecting your arbitrator?
 - How did you feel about the process?
 - o What role did mediation or Resolution Facilitation play during this pre-hearing phase?
 - How did you feel about the mediation or Resolution Facilitation process?
 - o Describe the time period it took to complete this process.
 - How did you feel about it?
 - Now let's discuss the actual arbitration hearing.
 - o Describe the environment in which the hearing took place.
 - Did any particular part of the hearing motivate your description more than another?
 - o What role did you play in the hearing?
 - Why do you think you assumed that role?
 - o Describe how you felt during the process?
 - Why do you think you felt this way?
 - o How did you feel when you were presenting your case?

- Why did you feel that way?
 - How did you feel when the respondent was presenting their case?
 - Why did you feel that way?
 - Describe the interaction between yourself and the arbitrator.
 - Why do you feel that way?
 - Describe the interaction between you and the respondent?
 - Why do you feel that way?
 - How did you feel about the time it took to conduct the hearing process?
 - Why do you feel that way?
- Now let's discuss the arbitrator's decision.
 - How was the decision initially communicated to you?
 - How did you feel about that?
 - How did you feel about the written decision?
 - How do you feel about the final and binding nature of the decision?
- 3. How did the arbitration process reconcile with your pre-arbitration expectations?
 - Where did those initial expectations about the process come from?
 - What did you appreciate or not appreciate about the process?
 - How did the arbitration process reconcile with your pre-arbitration expectations?
- 4. Overall, how do you feel about the arbitration process?
 - In what ways did the arbitration process agree with, or contradict with, your idea of a fair decision-making process.
- 5. If you could make any recommendations to the SDRCC what would they be?
 - What would you have changed about the process?
 - What stands out to you about your conclusion?

Notes on Developing Information in the Interview are based on Weiss (1994).

Extending

- What led to the incident?
 - How did that start?
 - What led to that?
- Consequences of the incident?
 - Could you go on with that?
 - What happened next?

Filling in Detail

- Getting more detail.
 - o Could you walk me through it?
 - o We need you to be as detailed as possible
- Go to the beginning of the story...
 - o So you were sitting there, talking to your guest, and this...What happened next?
 - o Can you walk me through it?

Identifying Actors

- Learn the social context.
 - o Was anyone else there?
 - o Who else was there and what did they do?

Others the Respondent Consulted

- Did you talk to anyone about what was going on?
- (Information about the respondent's view).

Inner Events (perceptions, cognitions, and emotions)

- When that was happening, what thoughts did you have?
- What were your feelings when he said that?
- Can you remember how you reacted, emotionally?

Making Indications Explicit

- You had some pretty definite feelings?
- What were the feelings you had?

Appendix C

Letter of invitation

LETTER OF INVITATION

August 3rd, 2010

Title of Study: Sport-Specific Arbitration in Canada: Athletes' perceptions of justice

Principal Investigator: Peter C. Gardner, MA Student, Department of Sport Management, Brock University

Faculty Supervisor: Hilary A. Findlay, Associate Professor, Department of Sport Management, Brock University

Dear Athlete:

My name is **Peter Gardner and I am a graduate student (MA)** in the Department of Sport Management of Brock University. I would like to invite you to participate in a research project I am doing as part of my graduate degree, entitled **Sport-Specific Arbitration in Canada: Athletes' perceptions of justice**.

The purpose of the study is to develop an understanding of how athletes perceive the fairness of the sport-specific arbitration process in Canada, heard through the Sport Dispute Resolution Centre of Canada (SDRCC). A select group of Canadian high performance athletes who have had disputes heard through the SDRCC arbitration process will be required to conduct this study. As you have been involved in such a dispute, I have identified you as a potential participant.

As a participant, you will be asked to participate in a telephone interview with the Principal Student Investigator, i.e., myself. The content of the interview will pertain to your experience in the SDRCC arbitral process. My interest is not in the dispute per se, but in how fair you felt the process to have been at the SDRCC level. Participation in the interview will take approximately 60-90 minutes of your time. The interview will be audio recorded and transcribed verbatim upon its completion. Shortly after the interview has been completed, I will send you a copy of the transcript in order to give you an opportunity to confirm that the content of the interview is factually accurate. If you have any issues with the interview transcript you can communicate them to me by email up to two weeks after receiving the initial email containing the interview transcript.

Possible benefits of participation include engaging in a detailed conversation about your arbitral experience with a keen listener. As well, the completion of this research will help fill a gap in the sport-specific arbitration literature regarding athletes' perceptions of the fairness of the process.

If you have any pertinent questions about your rights as a research participant, please contact the Brock University Research Ethics Officer (905 688-5550 ext 3035, reb@brocku.ca)

If you have any questions, please feel free to contact me.

Thank you

Peter C. Gardner

MA Graduate Student

(289) 668-8558

peter.gardner@brocku.ca

Hilary A. Findlay

MA Supervisor

(905) 688-5550 Ext.4811

hfindlay@brocku.ca

This study has been reviewed and received ethics clearance through Brock University's Research Ethics Board [file # 09-212]

Appendix D**Letter of informed consent****Informed Consent Letter**

Date: **April 26th, 2010**

Project Title: **Sport-specific Arbitration in Canada: Athletes' perceptions of justice**

Principal Investigator:

Peter C. Gardner, Graduate Student

Department of **Sport Management**

Brock University

289-668-8558; **peter.gardner@brocku.ca**

Faculty Supervisor:

Hilary A. Findlay, Associate Professor

Department of **Sport Management**

Brock University

(905) 688-5550 Ext.**4811**;

hfindlay@brocku.ca

Dear Athlete:

INVITATION

You are invited to participate in a study that involves research. The purpose of the study is to develop an understanding of how athletes view the fairness of the sport-specific arbitration process in Canada operated through the Sport Dispute Resolution Centre of Canada (SDRCC). Selected high performance Canadian athletes who have had disputes heard through the SDRCC arbitration process will be interviewed as part of this study.

WHAT'S INVOLVED

As a participant, you will be asked to participate in a semi-structured interview with the Principal Student Investigator. The content of the interview will pertain to your experience in an arbitration operated by the SDRCC. Participation in the interview will take approximately 60-90 minutes of your time. The interview will be audio recorded and transcribed verbatim upon completion. Shortly after the interview has been completed, the Principal Student Investigator will send you a copy of the transcript to give you an opportunity to confirm that the content of the interview is factually accurate. If you identify any errors in the interview transcript you may communicate them to the Principal Student Investigator by email up to two weeks after receiving the initial email containing the interview transcript.

POTENTIAL BENEFITS AND RISKS

Possible benefits of participation include engaging in a detailed conversation about your arbitral experience with a keen listener. As well, the completion of this research will help fill a gap in the sport-specific arbitration literature regarding athletes' perceptions of the fairness of the process. There are, however, some risks involved with your participation in the study. As this study requires a detailed account of your particular SDRCC arbitral experience, there is a chance that your responses may be identifiable by the unique facts of your dispute. This risk will be mitigated by assigning each research participants a pseudonym. In addition, there will be no mention of the athlete's NSO affiliation or mention of NSO representatives during the reporting phases of the research study.

CONFIDENTIALITY

The information you provide will be kept confidential. Your name will not appear in any thesis or report resulting from this study; however, with your permission, quotations identifiable by your chosen pseudonym may be used. Data collected during this study will be kept in a locked location in the Department of Sport Management until they are completely transcribed and analyzed. Upon completion of the transcription and analysis of the data, the paper copies of the documents will be shredded. Digital copies of the files will also be deleted from the Principle Student Investigator's computer hard drive. The transcripts of the interviews will be kept for a period of five years for possible secondary use in future research within the same general area of study. Access to this data will be restricted to the Principal Investigator (Peter Gardner) and the Faculty Supervisor (Dr. Hilary A. Findlay).

VOLUNTARY PARTICIPATION

Participation in this study is voluntary. If you wish, you may decline to answer any questions or participate in any component of the study. Further, you may decide to withdraw from this study at any time and may do so without any penalty or loss of benefits to which you are entitled.

PUBLICATION OF RESULTS

Results of this study may be published in professional journals and presented at conferences. Feedback about this study will be available from the Principle Student Investigator at the address above. It is anticipated this study will be completed by the end of August 2010.

CONTACT INFORMATION AND ETHICS CLEARANCE

If you have any questions about this study or require further information, please contact the Principal Student Investigator or the Faculty Supervisor using the contact information provided above. This study has been reviewed and received ethics clearance through the Research Ethics Board at Brock University (file # 09-212). If you have any comments or concerns about your rights as a research participant, please contact the Research Ethics Office at (905) 688-5550 Ext. 3035, reb@brocku.ca.

Thank you for your assistance in this project. Please keep a copy of this form for your records.

CONSENT FORM

I agree to participate in the study described above. I have made this decision based on the information I have read in this Information-Consent Letter. I have had the opportunity to receive any additional details I wanted about the study and understand that I may ask questions in the future. I understand that I may withdraw this consent at any time.

Name: _____

Signature: _____ Date: _____
